United States Court of Appeals

for the Second Circuit

APPENDIX

ORIG.

74-1433

B P/S

United States Court of Appeals

For the Second Circuit.

ANNE QUINN CORP. and EARL J. SMITH & CO., INC.,
n/k/a U. S. BULK CARRIERS, INC.,
Plaintiffs-Appellees,

against

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

Pages 1a to 160a.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

ANNE QUINN CORP. and EARL J. SMITH & Co., Inc., n/k/a U. S. Bulk Carriers, Inc.,

Plaintiffs-Appellees,

against

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

Relevant Docket Entries.

1971

June 30 Filed Complaint. Issued Summons
July 30 Filed Answer to Complaint

1973

June 27 Non-Jury trial begun before Bonsal, J.
June 29 Trial continued.
July 2 Trial continued and concluded. Decision reserved.
Dec. 14 Filed Opinion #40125. Bonsal, J.

1974

Jan. 29 Filed defendant's Proposed Counter-Judgment. Bonsal, J. Judgment entered Clerk. Entered 2-1-74
Feb. 25 Filed defendant's notice of appeal to the USCA from final judgment entered on 1-29-74.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANNE QUINN CORP. and EARL J. SMITH & Co., Inc., n/k/a U. S. Bulk Carriers, Inc.,

Plaintiffs,

against

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,

Defendant.

The plaintiffs, by their attorneys, Zock, Petrie, Sheneman & Reid, complaining of the defendant herein, respectfully alleges upon information and belief as follows:

1. This is a cause of Admiralty and Maritime jurisdiction as hereinafter more fully appears and plaintiffs invoke the maritime procedures specified in Rule 9(h) of the Federal Rules of Civil Procedure.

2. At all times hereinafter mentioned the plaintiff Anne Quinn Corp. was and still is a Delaware corporation with an office and principal place of business at 129 South State Street, Dover, Delaware.

3. At all times hereinafter mentioned plaintiff Earl J. Smith & Co., Inc., n/k/a U. S. Bulk Carriers Inc. was and still is a corporation organized and existing under the laws of the State of New York with an office and principal place of business at 17 Battery Place, City, County and State of New York.

4. That at all times hereinafter mentioned, the defendant, American Manufacturers Mutual Insurance Company, was and still is a New York corporation with its office and principal place of business at 110 William

Street, New York, New York and is duly authorized to carry on the business of ocean marine insurance and issuance of policies thereon in the State of New York.

5. This is an action for a declaratory judgment pursuant to 28 U. S. Code, Sec. 2201 and Sec. 2202, for the purpose of determining questions of actual controversy between plaintiffs and defendant and for further relief as more fully appears hereinafter.

6. On or about August 18, 1964 at New York, N. Y., in consideration of a premium of $7,500.00 paid by plaintiffs, defendant executed and delivered to plaintiffs its ocean marine policy of insurance number DE 3540, setting forth Standard "Bumbershoot" Wording, by the terms of which defendant insured the plaintiffs and the steamship Smith Voyager for a period of one year from noon, E.S.T. August 13, 1964 to noon E.S.T. August 13, 1965, and agreed to indemnify plaintiffs for all protection and indemnity risks of whatsoever nature, including, but not limited to, those covered by underlying Protection and Indemnity Insurance which were covered by The London Steam-Ship Owners' Mutual Insurance Association Ltd. and for all other sums which the plaintiffs shall become legally liable to pay or by contract or agreement become liable to pay in respect to claims made against plaintiffs for damages of whatsoever nature on account of personal injuries, including death, at any time resulting therefrom, and property damage in excess of $2,000,000 each vessel, each accident up to $5,000,000 ultimate net loss in respect of each occurrence as more particularly set forth in the policy, a true and exact copy of which is annexed hereto and incorporated herein as fully as if set forth at length herein.

7. While the said policy was in full force and effect, the Smith Voyager foundered and sank in the North Atlantic on December 20-27, 1964. Thirty two members

of the crew, the personal representatives of the estates of 4 crew members lost during the rescue, and the owner of the cargo aboard the vessel filed claims totalling $16,000,000 in a proceeding instituted in this Court (65 Ad. 55) by Sumner A. Long, the registered owner of the vessel, the plaintiff Anne Quinn Corp., the bareboat charterer, and the plaintiff Earl J. Smith & Co., Inc. its agent, pursuant to the Limitation of Liability Act, 46 U.S.C. Section 181 *et seq.* All claims sought punitive damages in addition to compensatory damages except the claims of Anna Veenstra and cargo. The petition was denied and the claimants were ordered to proceed to the adjudication of the amount of each claimant's damage. *Petition of Long*, 293 F. Supp. 172 (S.D.N.Y. 1968), 29 F. Supp. 857 (S.D.N.Y. 1968). Shortly before oral argument on appeal by the plaintiffs and Long to the U. S. Court of Appeals for the Second Circuit, Long agreed to pay the claimants $1,821,000 in settlement of their claims against him, and his appeal was withdrawn subject to the approval by this Court of the stipulation of settlement. This Court was affirmed on the issue of liability and the case was remanded for the disposition of the claims for damage against plaintiffs. 439 F. 2d 109 (2 Cir. 1971).

8. On May 21, 1971 this Court entered an order approving the stipulation of settlement, in excess of $10,000 each claim, exclusive of interest and costs, entered into among the attorneys for all of the 34 claimants remaining in the proceedings, the attorneys for The London Steam-Ship Owners' Mutual Insurance Association Limited, the primary insurance carrier for Long and the plaintiffs, and the attorneys for Long. The said order provides, among other things, that upon written representation of the attorneys for The London Steam-Ship Owners' Mutual Insurance Association that funds are available to pay the $1,821,000 settlement, this Court shall enter an order

granting Long exoneration from any further liability direct or indirect, dismissing all litigation against them with prejudice, such order to provide that the claimants' right to pursue and recover judgments from plaintiffs and to obtain full redress are not prejudiced. However, upon payment by the primary insurer (The London Steam-Ship Owners' Mutual Insurance Association, Ltd., the underlying Protection & Indemnity Insurer herein, up to $2,000,000 each vessel, each accident) to a claimant (or the representative of a deceased claimant) a credit with respect to any judgment obtained by such claimant against the plaintiffs in that proceeding, shall accrue to plaintiffs in an amount equal to the amount paid to such claimant by the primary insurer on behalf of Long.

9. Upon information and belief it was represented to this Court by the attorneys for The London Steam-Ship Owners' Mutual Insurance Association, Ltd. that the aforesaid sum of $1,821,000 and other sums amounting to $179,000 was a payment of the limits of the $2,000,000 policy, each vessel, each accident.

10. The payment by The London Steam-Ship Owners Mutual Insurance Association, Ltd. of the $2,000,000 limit of the underlying Protection and Indemnity Insurance, as set forth in defendant's policy, brings defendant's agreement to indemnify plaintiffs into play for all risks and loss sustained and which may be sustained up to $5,000,000 ultimate net loss.

11. During the course of the limitation of liability proceedings, the claim for personal injuries and maintenance and cure, filed by Alfred Ita, a seaman aboard the Smith Voyager, was settled by plaintiff Anne Quinn Corp. for $30,000 and the claim filed by James C. Gilmore, Second Mate, for loss of personal effects and wages was settled for $5,000.00 by plaintiffs. Plaintiff Anne Quinn Corp. incurred and/or paid other and additional monies arising

out of the loss of the S/S Smith Voyager. The sums of $30,000 and $5,000 and the other money expenses incurred and/or paid have not been reimbursed to plaintiff Anne Quinn Corp. by the defendant although due demand has been made therefor.

12. As provided in the policy Paragraph C, when the plaintiffs had information from which the plaintiffs reasonably concluded that any occurrence covered under the policy involved injuries or damages which, in the event that the plaintiffs should be held liable, was likely to involve the policy, notice was sent to Frank B. Hall & Co., Inc., 67 Wall Street, New York, N. Y. as soon as was practical.

13. As provided in the policy, Paragraph D, plaintiffs notified defendant to exercise its right and defendant was given the opportunity to associate with the plaintiffs and The London Steam-Ship Owners' Mutual Insurance Association, Ltd., the primary insurance carrier for plaintiffs, in the defense and control of the claims filed in the limitation of liability proceedings as the claims involved or appeared reasonably likely to involve the defendant, in which event the plaintiffs and defendant shall cooperate in all things in the defense of the claims. Contrary to its agreement to cooperate in all things in the defense of such claims, defendant refused and left the defense to the plaintiffs. Nevertheless, at the express request of defendant, the plaintiffs kept defendant advised of developments insofar as they concerned any possible liability on defendant's part under the aforesaid policy.

14. Although due demand was made by plaintiffs of defendant to take over the defense of all claims and suits for compensatory and punitive damages against them, the defendant wrongfully refused and neglected to do so.

15. The plaintiffs have complied with and duly performed all the conditions of the ocean marine policy on its part to be performed.

Marine Policy of Insurance No. DE 3540, Annexed to Complaint

16. By reason of the premises the plaintiffs reasonably anticipate that it will be liable to the claimants in a sum in excess of $2,000,000 withstanding the sum of $30,000 paid to Alfred Ita and the sum of $5,000 paid to James C. Gilmore.

WHEREFORE, plaintiff demands judgment declaring the respective rights and duties of plaintiffs and defendant with respect one to the other by virtue of the said contract of ocean marine insurance and the claim asserted by plaintiffs against defendant that the contract of ocean marine insurance includes indemnity for punitive damages; that the defendant shall cooperate in all things in the defense of the claims for damages pending in this Court; that defendant shall take over the defense of the claims at its risk and expense; that in the event plaintiffs shall be held liable to the claimants for compensatory and punitive damages in excess of $2,000,000, that the defendant shall be held liable to and indemnify plaintiffs up to $5,000,000 ultimate net loss including the settlement of the claims of Alfred Ita and James C. Gilmore, and all costs, expenses, counsel fees and items within the term ultimate net loss as defined in the policy and for such other, further and different relief in law or equity as may be just and proper.

ZOCK, PETRIE, SHENEMAN & REID
By EDWIN K. REID
Attorneys for Plaintiffs
19 Rector Street
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Marine Policy of Insurance No. DE 3540, Annexed to Complaint.

(Reproduced, *infra*, at page 161a as Defendants' Exhibit A.)

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, by its attorneys, Thacher, Proffitt, Prizer, Crawley & Wood, answering the complaint herein:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Denies that it has any knowledge or any information sufficient to form a belief as to the allegations contained in paragraph 2 of the complaint.

3. Denies that it has any knowledge or any information sufficient to form a belief as to the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Admits that plaintiffs purportedly seek a declaratory judgment in their complaint, but denies each and every other allegation contained in paragraph 5 of the complaint.

6. Admits that on or about August 18, 1964, at New York, New York, a policy of ocean marine insurance bearing No. DE 3540 was issued by defendant to plaintiffs and that a true copy of the purported policy is annexed to plaintiffs' complaint; defendant further alleges that policy No. DE 3540 is null and void, invalid and unenforceable because it was procured from defendant by plaintiffs through concealment and misrepresentation of facts material to the risks sought to be insured. Except as thus expressly admitted, defendant denies each and every allegation contained in paragraph 6 of the complaint.

7. Admits that the Smith Voyager foundered and sank in the North Atlantic on December 20-27, 1964; that certain claims for bodily injury, death and cargo damage were subsequently filed against plaintiffs by crew members and the cargo owner in a proceeding commenced in this court by the vessel owner and plaintiffs pursuant to the Limitation of Liability Act, 46 U. S. Code §§181 *et seq.;* that plaintiffs' petition for limitation of liability has been denied by this court in a decision which has been affirmed by the United States Court of Appeals for the Second Circuit; and that the owner of the Smith Voyager has agreed to settle the claims for bodily injury, death and property damage in the amount of $1,821,000 in consideration of the termination of all litigation as to the vessel owner with prejudice and execution and delivery by each claimant of a covenant not to sue. Except as thus expressly admitted, defendant denies each and every allegation contained in paragraph 7 of the complaint.

8. Admits that on May 21, 1971, the court entered an order in plaintiffs' limitation of liability action approving the stipulation of settlement between the claimants and the vessel owner but defendant respectfully refers the court to the order itself for the terms thereof. Except as thus expressly admitted, defendant denies each and every allegation contained in paragraph 8 of the complaint.

9. Defendant denies that the London Steamship Owners' Mutual Insurance Association, Ltd., has paid the full limit of its underlying policy of protection and indemnity insurance applicable to the Smith Voyager casualty and denies each and every other allegation contained in paragraph 9 of the complaint.

10. Denies each and every allegation contained in paragraph 10 of the complaint.

Answer

11. Denies that defendant has any knowledge or any information sufficient to form a belief as to the allegations contained in paragraph 11 of the complaint.

12. Denies that any of the provisions of the purported policy attached to plaintiffs' complaint are applicable or enforceable in respect of the loss alleged and further denies that defendant has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 12 of the complaint.

13. Denies that any of the provisions of the purported policy annexed to plaintiffs' complaint are applicable or enforceable in respect of the loss alleged and denies that defendant has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 13 of the complaint.

14. Admits that plaintiffs have made certain demands on defendant to participate in the defense of claims and suits resulting from the Smith Voyager casualty, but denies each and every other allegation contained in paragraph 14 of the complaint.

15. Denies each and every allegation contained in paragraph 15 of the complaint.

16. Denies each and every allegation contained in paragraph 16 of the complaint.

First Defense

17. Plaintiffs have failed to allege a claim upon which relief can be granted.

Second Defense

18. In seeking the marine insurance alleged in their complaint, plaintiffs and their agents were required by

law to conduct their negotiations with defendant's ocean marine underwriter in the utmost good faith and to disclose to defendant all information which they knew or ought to have known that was material to the risks sought to be insured.

19. In breach of their duty of disclosure to defendant in seeking the marine insurance alleged in their complaint, plaintiffs concealed and withheld from defendant the material facts that plaintiffs had been and were knowingly operating the Smith Voyager and other vessels sought to be insured overloaded to drafts exceeding their legal limits, a criminal offense in violation of the Load Line Act, Title 46, U. S. Code, §§85 *et seq.*

20. Without knowledge of the foregoing material facts which plaintiffs had concealed from defendant in negotiating the marine insurance alleged in the complaint, defendant executed and delivered to plaintiffs Policy No. DE 3540, a copy of which is annexed to the complaint.

21. If plaintiffs had disclosed to defendant that plaintiffs had been and were operating the Smith Voyager and other vessels sought to be insured, in an overloaded condition in violation of the provisions of the Load Line Act, Title 46, U. S. Code §§85 *et seq.*, defendant would have declined and refused to issue Policy No. DE 3540 to plaintiffs.

22. By reason of the premises Policy No. DE 3540 was unlawfully procured and was and is null and void, invalid and unenforceable.

Third Defense

23. Defendant repeats and realleges the allegations contained in paragraph 18 of this answer.

24. In seeking the marine insurance alleged in their complaint, plaintiffs answered in writing a questionnaire

in which they represented that there were no facts other than those stated in the questionnaire which might affect the judgment of defendant's underwriters in considering plaintiffs' application. That representation was false in that plaintiffs omitted to disclose in answering the questionnaire the material facts that plaintiffs had been and were knowingly operating the Smith Voyager and other vessels sought to be insured, overloaded to drafts exceeding their legal limits, a criminal offense in violation of the Load Line Act, Title 46, U. S. Code §§85 *et seq.*

25. In reliance upon plaintiffs' representations and without knowledge of their falsity or of the facts concealed by plaintiffs as alleged in paragraphs 19 and 24 hereof, defendant executed and delivered to plaintiffs Policy No. DE 3540, a copy of which is annexed to the complaint.

26. Defendant would not have issued Policy No. DE 3540 to plaintiffs but for the misrepresentations and concealments alleged in paragraphs 19 and 24 of this answer. By reason of the premises, Policy No. DE 3540 was unlawfully procured and was and is null and void, invalid and unenforceable.

Fourth Defense

27. If the policy of marine insurance alleged in the complaint should be held to have been validly procured, the losses alleged in the complaint were excluded from the coverage afforded pursuant to paragraph I(a) of the Exclusions which provided:

> "THIS POLICY SHALL NOT APPLY:
>
> I. (a) to indemnify an Assured whose dishonesty or fraud, committed individually or in collusion with others, caused the loss for which that Assured seeks indemnity; • • •"

Answer

28. An action was commenced in this court (65 Ad. 55) by plaintiffs seeking to limit their liability as bareboat charterer and managing agent of the Smith Voyager for damages on account of death, bodily injury and property damage asserted by the claimants who appeared therein as parties. In that action it has been adjudged and affirmed on appeal that the loss of the Smith Voyager and the deaths, injuries and damages consequent thereon were proximately caused by the overloading of the Smith Voyager with the knowledge of plaintiffs to a draft exceeding the vessel's legal limit. The overloading of the Smith Voyager was a criminal offense committed in violation of the Load Line Act, 46 U. S. Code §§85 *et seq.* The claim alleged by plaintiffs resulted from their fraud and dishonesty in overloading the Smith Voyager, a risk which was excluded from the coverage, if any, afforded by Policy No. DE 3540.

Fifth Defense

29. If Policy No. DE 3540 should be held to have been validly procured, defendant as excess insurer did not undertake to provide plaintiffs with the defense of any claim or suit or to pay any litigation expenses covered by other insurances. By reason of the premises, defendant is not liable for any defense expenses alleged by plaintiffs.

Sixth Defense

30. If Policy No. DE 3540 should be held to have been validly procured and to be applicable to any part of the losses alleged in the complaint, the policy did not afford coverage to plaintiffs, as a matter of law and public policy, for punitive or exemplary damages based upon any wanton, willful or grossly reckless act which plaintiffs may be adjudged to have committed.

Answer

Seventh Defense

31. If Policy No. DE 3540 should be held to have been validly procured and to be applicable to any portion of the loss alleged by plaintiffs, defendant is entitled to set off against plaintiffs' claim the aggregate amount by which settlement payments heretofore made to any claimants exceed the amount of such claimants' provable damages.

WHEREFORE defendant prays for judgment dismissing the complaint herein with costs and granting defendant such further relief as may be proper.

THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD
By s/ Edward C. Kalaidjian
A member of the firm
Attorneys for Defendant
40 Wall Street
New York, New York 10005
Telephone: 269-5100

Opinion of Bonsal, J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Zock, Petrie, Sheneman & Reid, Esqs., 19 Rector St., New York, N. Y. 10006, Attorneys for Plaintiffs Anne Quinn Corp. and Earl J. Smith & Co. Inc., Edwin K. Reid, Esq., Of Counsel.

Freedman, Borowsky and Lorry, Esqs., Chestnut St. at Fifth, Philadelphia, Pa. 19106, Attorneys for 34 Personal Injury and Death Claimants, Marvin I. Barish, Esq. and Sanford I. Jablon, Esq., Of Counsel.

Davis and Davis, Esqs., 116 John Street, New York, N. Y. 10038, Attorneys for A. Veenstra.

Baker, Nelson & Williams, Esqs., 20 Exchange Place, New York, N. Y. 10005, Attorneys for India Supply Mission, O. Taft Nelson, Esq. and Robert E. Meshel, Esq., Of Counsel.

Thacher, Proffitt & Wood, Esqs., 40 Wall Street, New York, N. Y. 10005, Attorneys for Defendant, Edward C. Kalaidjian, Esq., Robert G. Maass, Esq., Of Counsel.

BONSAL, D. J.:

This suit in admiralty for a declaratory judgment seeking to recover on Ocean Marine Policy No. DE 3540 ("the Policy") issued by defendant American Manufacturers Mutual Insurance Company[1] on August 18, 1964

[1]Defendant is a New York corporation with a principal place of business at Long Grove, Illinois and is duly authorized to conduct the business of ocean marine insurance and to issue marine insurance policies in the State of New York.

to plaintiffs Anne Quinn Corporation ("Quinn") and Earl J. Smith & Company ("Smith")[2] was tried without a jury.

Quinn was the bareboat charterer of the S.S. Smith Voyager ("Voyager"), which foundered and sank in the Atlantic Ocean in December of 1964, while the Policy was in effect. Smith was the general agent of Quinn. Thirty-six claims were filed by or on behalf of members of the crew of the Voyager as a result of the sinking, including four death claims and thirty-two personal injury claims ("the individual claimants"). In addition, the India Supply Mission ("the cargo claimant") filed a claim for the loss of the cargo, consisting of 10,204 tons of grain. Together, these claims total $16,000,000. Two of the individual claimants have settled their claims, for $5,000 and $30,000 respectively.[3] The remaining claimants have intervened in this action.

Ocean Marine Policy No. DE 3540 is an excess insurance or "Bumbershoot" policy[4] whereby defendant agreed

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[2]Plaintiff Quinn is a Delaware corporation with a principal place of business at Dover, Delaware. Plaintiff Smith is a New York corporation now known as U. S. Bulk Carriers, Inc. with a principal place of business in the City of New York.

[3]The claim filed by James C. Gilmore, second mate, for loss of personal effects and wages was settled for $5,000; and the claim for personal injuries and maintenance and cure, filed by Alfred Ita, a seaman aboard the Voyager, was settled for $30,000. These claims were paid by Quinn, which has demanded but not received reimbursement from defendant.

[4]Because basic or primary insurance is limited in respect to any one accident or occurrence to the amount insured, it is considered desirable to effect excess protection and indemnity insurance, i. e., Bumbershoot coverage. "As to losses covered by the underlying insurances, the Bumbershoot policy responds only after the limits of the underlying insurances are exhausted; as to losses not covered by other insurance, the Bumbershoot responds initially subject to the deductible specified (*Tulane Law Review*, Vol. 43, No. 3, p. 676)." L. Buglass, Marine Insurance And General Average In The United States, 257-58 (1973).

to indemnify plaintiffs for all protection and indemnity risks of whatsoever nature including, but not limited to, those covered by the primary insurance policy with respect to all claims for personal injury and property damage in excess of $2,000,000 and up to $5,000,000 for each vessel covered, each accident. The term of the Policy ran from noon E.S.T. August 13, 1964 to noon E.S.T. August 13, 1965, and the annual premium was $7,500. The Policy's terms and the premium were the same as those in the previous year's policy (No. DE 1751) issued by defendant to plaintiffs.

Clause I(a) and I(b) of the Policy's exclusions provide:

> "THIS POLICY SHALL NOT APPLY:
>
> I (a) to indemnify an Assured whose dishonesty or fraud, committed individually or in collusion with others, caused the loss for which that Assured seeks indemnity; nor
>
> (b) to indemnify any Assured against claims based upon any intentional non-compliance with any statute or regulation unless such claim(s) be for damages occasioned by actual or alleged bodily injury (fatal or otherwise) or physical loss of, damage to, and/or loss of use of tangible property."

On October 29, 1968, this court denied the petition of Smith, Quinn, and Sumner A. Long ("Long") (the owner of the Voyager) for exoneration from or limitation of liability. *Petition of Long*, 293 F. Supp. 172 (S.D.N.Y. 1968). The court found that the Voyager was overloaded when she broke ground at Houston, Texas on December 12, 1964; when she departed Freeport, Grand Bahama Island on December 15; and when she sank on December 27; and that the overloading was a substantial cause of the Voyager's sinking. The court also found that the

overloading of the Voyager had occurred with the privity and knowledge of Smith, Quinn, and Long.

Shortly before argument on the appeal from this court's decision, Long agreed to pay the claimants $1,821,000 in settlement of their claims against it, and Long's appeal was withdrawn subject to the approval by this court of the stipulation of settlement. On March 3, 1971, the Court of Appeals affirmed with respect to the liability of Smith and Quinn and remanded for disposition of the claims for damages. *Petition of Long*, 439 F. 2d 109 (2d Cir. 1971). On May 21, 1971, the court approved the stipulation of settlement between Long and the 34 claimants.

The policy of the primary insurer, The London Steam-Ship Owners' Mutual Insurance Association, Ltd., was limited to $2,000,000 for each vessel, each accident. Under its policy, the primary insurer has made payments totalling $1,987,501.58, including $1,821,000 paid with respect to personal injury, death, and cargo claims, and $166,501.58 representing payments for the repatriation of the crew, maintenance, attorneys' fees, and expenses in the limitation proceedings. The balance of $12,498.42 is being held by the primary insurer pending a final determination of all the claims, when it will be paid out to exhaust the limits of the primary policy. The individual and cargo claimants have received payments under the settlement and contend that they are entitled to additional damages to be paid out of the Policy.[5]

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[5]SCHEDULE OF SETTLEMENTS

Claimant	Settlement Figure
Marcelo Arzu (formerly Cayetano)	$ 15,000
Clarence Brown	32,000
Vernon Brown (Deceased)	125,000
Lester Carruth	20,000
Donald Covert	90,000
Joseph Charles	23,000

The complaint alleges that under the Policy, defendant is liable to the plaintiffs to take over the defense of the pending claims at its risk and expense, and, in the event that plaintiffs should be held liable, to indemnify plaintiffs up to the $5,000,000 limitation of the Policy.

(footnote continued)

George Davis (Deceased)	80,000
Manuel Diaz	82,500
James Garcia	30,000
John Gorey	50,000
John Groskey	17,000
Buster Harris	35,000
Shedrick James	20,000
Per Johansen	40,000
Eli Jones (Deceased)	30,000
John Keeler	24,000
William Kelly	17,500
John Kraine	70,000
John Lukens	15,000
Herbert Malo	45,000
Melchor Marcelo	15,000
Porfirio Martinez	17,500
Connie McCalla	50,000
Freeman McDonald	30,000
Gilbert Ochoa	100,000
Roy Lee Perkins	57,500
Joseph Sinegal	22,500
Joseph Sonntag	20,000
Isaiah Taylor	27,500
Herbert Tenney	27,500
Paul Woodworth	22,500
James Wright	55,000
TOTAL	$1,306,000

SCHEDULE OF SETTLEMENTS
DEALING WITH THE PARTIES NOT REPRESENTED BY FREEDMAN, BOROWSKY AND LORRY

Cargo Claim	$405,000
Estate of Veenstra	110,000

There is no dispute that defendant received timely notice from the plaintiffs' broker of the sinking of the Voyager and of the presentation of the personal injury, death, and property damage claims. The defendant associated with the plaintiffs and the primary insurer in the defense and control of the claims until November 25, 1968 (after the court's determination that overloading had caused the sinking of the Voyager), when defendant notified Smith and Quinn that it considered the Policy to be void and tendered return of the $7,500 premium, which tender was not accepted, and the check was returned to defendant by plaintiffs on December 4, 1968.[6]

Defendant denies liability under the Policy on the following grounds: 1) that the Policy was void from its inception because the plaintiffs did not disclose at the time it was issued their alleged practice of overloading their vessels; 2) that under clause I(a) of the Policy's exclusions, the Policy does not cover plaintiffs' losses because they were caused by the plaintiffs' alleged dishonesty or fraud in overloading their vesels.

Plaintiffs contend that there was no fraud with respect to the issuance of the Policy because it was a matter of common knowledge in the marine industry that "tramp" vessels, such as the Voyager, engaged in the grain trade from United States gulf ports to India, would leave the gulf ports loaded to their marks with fuel to reach Caribbean bunkering ports, would then take on bunkers for the voyage across the Atlantic Ocean, and would leave the bunkering ports overloaded; plaintiffs contend that defendant knew or should have known of this practice at the time the policy was issued. Plaintiffs also contend that the overloading of the Voyager, which the court found violated the United States Load Line Act, 46 U.S.C. §85, *et seq.*, *Petition of Long*, 293 F. Supp.

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[6]The court finds that there was no waiver of defenses to the Policy.

at 177, would be, at most, an "intentional non-compliance with [a] statute" within the meaning of clause I(b) of the Policy's exclusions, entitling plaintiffs to indemnification for the personal injury and property damage claims.

A marine insurance contract is *uberrimae fidei*, requiring the highest degree of good faith. If the assured fails to disclose any material fact or circumstance known to him, then the policy is voidable at the instance of the insurer. See 9 G. Couch, Insurance §§ 38:74-38:82 (2d ed. 1962). However, where the means of information may be equally open to both parties, and where concerning such matters, each professes to act from his own skill and sagacity, there is no need for either to communicate to the other party matters of general knowledge known to the enlightened or mercantile community at large, including well-established customs and usages, geography and natural perils, and political and international conditions. Silence in such matters does not affect the validity of the contract. See 9 G. Couch, Insurance §§ 38:84-38:95 (2d ed. 1962). As the Supreme Court said in *Clark et al. v. Manufacturers' Insurance Co.*, 49 U. S. (8 How.) 235, 248 (1850):

> "[T]he insurer must be presumed to know what is material in the course of any particular trade,—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties."

See also L. Buglass, Marine Insurance and General Average in the United States 14-17 (1973).

In *Buck & Hedrick v. The Chesapeake Insurance Co.*, 26 U. S. (1 Pet.) 151 (1828), suit was instituted on two policies of insurance on cargo shipped "from the Spanish island of Porto Rico to Baltimore, *for whom it may concern.*" 26 U. S. (1 Pet.) at 157. The Court held that since the insurers ought to have been aware of the practice of neutrals covering belligerent property under neu-

tral names, the plaintiffs suing to enforce the policies were not bound to prove that at the time of effecting the insurance they disclosed to the defendant that Spanish property was intended to be covered by the insurance, unless the insurer made specific inquiry. 26 U. S. (1 Pet.) at 164. The Court quoted Lord Mansfield, in *Pelly v. The Royal Exchange, etc.* (1 Bur. 341):

> "[T]he insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy." 26 U. S. (1 Pet.) at 160.

It developed at trial that Marine Consultants & Designers, Inc., a firm of naval architects, made a study of plaintiffs' records pertaining to the alleged overloading of thirteen of the seventeen vessels operated by the plaintiffs and covered by the policy.[7] This study disclosed that between February, 1963 and August 13, 1964 (the inception date of the policy), thirty-seven voyages were made from United States gulf ports to the Far East via Freeport, and on thirty-six of these voyages the vessels departed from Freeport overloaded. With respect to the thirty-seventh voyage, the study concluded that the vessel was "probably overloaded," though the specific records to prove it were not available. Subsequent to August 13, 1964, during the period the policy was in effect, Marine Consultants & Designers, Inc. studied

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[7]These records included National Cargo Bureau loading certificates showing the weights of cargoes, and radio messages, correspondence from the vessels' masters, port agents and suppliers, invoices for fuel and water, log book extracts, engineers' reports and passage reports showing the weights of fuel and fresh water furnished to the vessels at various ports of call or on board the vessels when they departed from bunkering ports.

nineteen voyages of plaintiffs' vessels from gulf ports to the Far East via Freeport and Ceuta. Of the nineteen voyages, there was evidence of overloading on seventeen. The court finds on the basis of this evidence that the plaintiffs did engage in the practice of overloading their vessels.

Mr. Charles Diamond, Vice President of Dyson Shipping Company, which since 1952 has handled the shipping of bulk grains from the United States to India, testified that on the period from 1962 to 1964 the Indian government was shipping "four or five or more millions of tons of grain" from the United States to India. Dyson shipping records indicate that of the approximately 160 voyages made each year to India—by vessels operated by plaintiffs as well as others—approximately 90 percent were made with loads exceeding the tonnage for which the vessel was chartered.

Captain Charles Scarpello and Captain Frank DiVenti testified that on the six or seven voyages they made from gulf ports to the Far East aboard vessels not operated by the plaintiffs, the vessels were overloaded departing Freeport. They also testified that this was a common and well-known practice for their own vessels and others they observed.

The parties stipulated that had Captain Garth Read, a marine inspector for the United States Coast Guard, testified, he would have testified that the Coast Guard was aware of the practice of overloading vessels at Freeport, but could do nothing about it because Freeport was outside of its jurisdiction.

The court finds on the basis of this evidence that the practice of overloading vessels bound for the Far East at Freeport was a common practice in the trade and was widely known.

The evidence brought out at trial also indicates that there was widespread knowledge of this practice among marine underwriters. Mr. Robert Dwelly, a marine un-

derwriter for the Insurance Company of North America for 37 years, testified that he became aware of the practice at least as early as November 15, 1962, when he attended the regular monthly meeting of the Board of Managers of the American Hull Insurance Syndicate, during which meeting the matter was discussed. After the meeting, the minutes reporting the discussion were distributed to each of the insurance companies represented on the Board of Managers. Mr. Dwelly also testified about a book he co-authored, *Touching the Adventures and Perils, the American Hull Insurance Syndicate*, in which he wrote:

> "The year's [1964's] best-publicized marine disaster, though it cost the Syndicate only $446,151, was that which overtook the Victory-type American tramp ship *Smith Voyager*. En route from Houston to Indian ports fully laden with grain, this vessel had stopped at Freeport in the Bahamas, following common shipping practice, to top off her oil bunkers for the long voyage ahead. Without question (and not without precedent), she left Freeport over-laden. Five days later, in heavy mid-Atlantic weather, she was stopped by an engine breakdown, took a sharp, permanent list, and had to be abandoned, four lives being lost in the course of rescue operations by a German freighter. Taken in tow for Bermuda, she foundered on December 27. After some deliberation, the Syndicate determined to pay the total loss 'without condoning the overloading which seemed apparent in the case' and with a stipulation 'that consideration be given to an appropriate advice, presumably though marine brokers . . ., of the Syndicate's strong feeling regarding violations of safety regulations.' An ironic aspect of this casualty was that, at a Board of Managers meeting two years

> earlier, it had been asserted 'that there is apparently no supervision in bunkering ports such as Freeport . . . with respect to the draft of vessels taking on fuel and water' and that 'vessels, already deeply laden with cargo on entering the bunkering port, were sailing below their marks.' It took the *Smith Voyager* to drive the point home." *Id.* at 194-95.

The evidence at trial also disclosed that information about destinations of chartered vessels and tonnages of cargoes carried, which revealed the practice of overloading, was regularly published in industry publications, to which defendant had access or subscribed.[8] In light of this evidence, the court finds that knowledge of the practice of overloading at Freeport was widespread in the industry and that the defendant knew or should have known of it.[9] See *Buck & Hedrick v. The Chesapeake Insurance Co., supra*, at 160.

Mr. John Blackman, defendant's marine underwriting manager, testified that plaintiffs' insurance broker contacted him in early August, 1964 to request a renewal of the expiring Bumbershoot policy No. 1751. As the

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[8]The testimony brought out that the Maritime Research Service carries this information on a weekly basis. In addition, The Journal of Commerce, to which defendant subscribed, usually carries information about tonnage used in the industry. The defendant also had available Lloyd's lists showing the vessels operating in the industry, tonnages, dead weights, classifications, and other specifics of the vessels.

[9]The court also notes that the defendant had insured the plaintiffs' vessels for the prior year, and that during the period from 1962 to 1964 a great number of plaintiffs' and other vessels were being operated in overloaded conditions. Because of this, the defendant had a reasonable basis for the calculation of the risks attendant upon the operation of the vessels it insured, irrespective of whether the defendant actually knew of the overloading practice.

renewal of such policies was not automatic, Mr. Blackman asked plaintiffs' broker to submit an application for the requested coverage on defendant's standard form, a questionnaire requesting information about plaintiffs' marine and non-marine operations, the vessels to be covered, the primary insurance to be carried, and the limits over which the requested coverage would be excess. The questionnaire, however, included no questions specifically with respect to overloading. Nor did it request information about amounts of cargo to be carried or at which ports the covered vessels would take on bunkers. The last question (#12) merely asked the applicant to "describe any known deficiencies of insurance or any other relevant facts which might affect underwriters judgment when considering this application." Plaintiffs' broker responded: "None to our knowledge." In view of the well-known practice in the industry discussed above, this response to the questionnaire's open-ended, catch-all question was neither a misrepresentation nor a breach of the plaintiffs' duty of good faith.

Moreover, clause I(b) of the Policy's exclusions, which precludes the *insured* from receiving indemnity on losses *it* may have sustained as a result of its intentional noncompliance with a statute or regulation, nevertheless provides that *personal injury or property damage claimants* may recover under the Policy. The public policy reasons underlying this provision are compelling here: As between the insurer (who undertook the risk on the basis of its calculation of previous premium and loss experience, where the vessels traded, their cargo, upkeep, handling, management, and other factors relied upon by their underwriters) and the individual and cargo claimants (who were innocent of any misrepresentations or wrongdoing), the insurer should bear the risk that the insured might violate a statute or regulation which would cause a loss. As this court found, the cause of

the Voyager's sinking was the overloading, which violated the Load Line Act, 46 U.S.C. §85 *et seq.* As such, it constituted "non-compliance with [a] statute" within the meaning of clause 1(b), entitling the plaintiffs to indemnification for the personal injury and property damage claims.

Accordingly, the court finds that the policy is not void and that plaintiffs are entitled to recover under it to the extent that their claims are "occasioned by actual or alleged bodily injury (fatal or otherwise) or physical loss of, damage to, and/or loss of use of tangible property."

The foregoing constitutes the court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

Settle judgment on notice.

Dated: New York, N. Y.
December 14, 1973.

s/ DUDLEY B. BONSAL
U. S. D. J.

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiffs, having commenced this action within the admiralty and maritime jurisdiction of this court for judgment declaring the rights and duties of the plaintiffs and defendant with respect to Ocean Marine Policy No. DE 3540 dated August 18, 1964, and the issues having come on for trial before the court, the Honorable Dudley B. Bonsal, District Judge, presiding, and the court having rendered its decision dated December 14, 1973, and the court having found for purposes of Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay in the entry of final judgment,

Now, upon motion of Thacher, Proffitt & Wood, attorneys for defendant, it is

ORDERED, ADJUDGED AND DECREED that Ocean Marine Policy DE 3540 is a valid and existing policy and that plaintiffs are entitled to indemnification from the defendant in accordance with its terms and conditions in respect of their liability for actual bodily injury, fatal or otherwise, and physical loss of and damage to tangible property occasioned by the sinking of the SS Smith Voyager in December 1964, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to recover from defendant in accordance with the terms and conditions of Policy DE 3540 the fair and reasonable charges for fees and expenses incurred by plaintiffs during the period from October 29, 1968 through and including March 4, 1971 to the firm of Zock, Petrie, Sheneman and Reid as plaintiffs' counsel in the SS Smith

Notice of Appeal

Voyager limitation of liability proceeding pending in this court (65 Ad. 55); and it is further

ORDERED, ADJUDGED AND DECREED that the court does hereby retain jurisdiction of the captioned case for purposes of adjudicating any issues which may subsequently arise between plaintiffs and defendant pertaining to plaintiffs' damages.

Dated: New York, New York
January 28, 1974

DUDLEY B. BONSAL
U. S. D. J.

Judgment entered on the 29 day of
January, 1974
RAYMOND F. BURGHARDT
Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Notice is hereby given that American Manufacturers Mutual Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of

the final judgment entered herein on the 29th day of January, 1974.

Dated: New York, New York
February 25, 1974.

s/ THACHER, PROFFITT & WOOD
Attorneys for Defendant
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New York, New York 10005
Telephone: 483-5800

To:

Clerk
United States District Court
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Excerpts From Transcript.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ANNE QUINN CORPORATION and EARL J. SMITH & Co., Inc., n/k/a U. S. Bulk Carriers, Inc.,

Plaintiffs,

against

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,

Defendants.

71 Civ. 2924

Before:

Hon. Dudley B. Bonsal, District Judge.

New York, New York,
June 27, 1973

Appearances:

Davis & Davis, Esqs., Attorneys for Plaintiffs, By: Harold Davis, Esq., of Counsel.

Zock, Petrie, Reid, Curtin & Byrnes, Esqs., Attorneys for Plaintiffs, By: Edwin Reid, Esq., of Counsel.

Baker, Nelson & Williams, Esqs., Attorneys for Plaintiff, By: Robert Meshel, Esq., of Counsel.

(1A) Freedman, Borowsky & Lorry, Esqs., Attorneys for Plaintiffs, By: Sanford Jablon, Esq., and Marvin Barish, Esq., of Counsel.

Thacher, Proffitt & Wood, Esqs., Attorneys for Defendant, By: Edward Kalaidjian, Esq., and Robert G. Maass, Esq., of Counsel.

* * *

(7) JOHN BLACKMAN, called as a witness on behalf of the Defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Kalaidjian:

Q. Will you state your home address? A. 596 Hollowtree Ridge Road, Darian, Connecticut.

Q. How old are you? A. 48, 49 today.

Q. What's your occupation? A. I am a Marine Underwriter.

Q. Would you state briefly what your educational background is, above the secondary school level. A. I graduated from Yale University and attended B. U. Law School nights.

Q. How many years have you been in the business of Marine Underwriting? A. Approximately 25.

Q. By whom are you presently employed? A. I am self-employed in my own firm called Mutual Marine Office.

Q. What's the business of Mutual Marine Office? (8) A. Mutual Marine Office is a managing agency for approximately ten insurance companies engaged principally in writing Ocean Marine Insurance.

Q. How long have you been with Mutual Marine Office? A. Approximately eight and a half years.

Q. By whom were you employed prior to your association with Mutual Marine Office? A. The Kemper Insurance Group.

Q. Was there in the Kemper Insurance Group a company known as American Manufacturers Mutual Insurance Company? A. Yes.

Q. Did you perform any work on behalf of American Manufacturers Mutual Insurance Company? A. Yes, sir, I was in charge of their marine operations.

Q. During what period did you work for the Kemper Group and the American Manufacturers Mutual Insurance Company, approximately? A. Approximately seven or eight years before starting my own firm.

Q. You were the marine manager of American Manufacturers Mutual Insurance Company? A. Yes, sir.

Q. Would you describe just briefly the scope of your (9) responsibilities in that capacity? A. Basically, the acceptance of business from brokers, underwriting, managing, premium collection and lot [loss] settling.

Q. At the American Manufacturers Mutual Insurance Company, did you deal with various marine brokers in New York? A. Yes, sir.

Q. In what connection would you deal with brokers? A. Brokers acting as agents for the insured would offer us risks for acceptance.

Q. Was it your function to evaluate the risk and determine on what terms, if at all, you would accept? A. Yes, sir.

Q. Were you acquainted during that period with a New York broker named Frank B. Hall and Company? A. Approximately ten years.

Q. What sort of business had you done with the Hall Company—that is, as Marine Manager of American Manufacturers. A. We had a sizeable volume of ocean marine premium from that firm.

Q. When you say, "We," are you referring to the Ocean Marine Department of the American Manufacturers? (10) A. Yes, sir.

Q. Did you know any of the brokers on the marine side at Frank B. Hall and Company? A. Yes, sir.

Q. At that time, whom did you know in— A. I knew almost all of the brokers who were engaged in placing marine risks.

Q. Did you know Mr. John Lucey? A. Yes, sir.

Q. In what capacity did you know him? A. As a marine broker.

Q. What can you say about the size of the marine brokerage operation conducted by Frank B. Hall in 1964 as compared with other New York brokers? A. It was

sizeable. I am not too sure it was the largest. It was among the larger premiums we wrote.

Q. In 1964, did the firm of Frank B. Hall and Company, Inc., act as broker for Earl Smith and Company? A. Yes.

Q. Did you personally have any dealings with anyone at Frank B. Hall and Company concerning insurance for the account of Earl Smith and Company? A. Yes, Mr. Lucey brokered the risk.

Mr. Kalaidjian: Could we mark for identification (11) Policy #—a document which bears the description at the top, the title, "Ocean Marine Policy # D. E. 3540, which has previously been marked Lucey B for identification in a pre-trial deposition.

The Court: Any objection to the policy?

Mr. Davis: No objection.

Mr. Meshel: No objection.

Mr. Kalaidjian: I will offer it in evidence.

The Court: That will be marked Defendant's Exhibit A.

(Defendant's Exhibit A received in evidence.)

Q. Mr. Blackman, could you tell us what type of policy Exhibit A is? A. It's a blanket excess liability policy.

Q. Covering what sort of risks?

Mr. Davis: I object, your Honor. It speaks for itself. It's a legal document. It should speak for itself.

The Court: Mr. Davis, I looked at it, and anything this gentleman has to say might be helpful to me.

Mr. Davis: Yes, your Honor.

The Court: You agree with that. I will let him answer the question.

Mr. Davis: I want to point up the fact the (12) characterization by this man shouldn't override it.

The Court: I understand that. If he has any light on that policy I will be glad to hear it.

(Question read.)

A. It's a policy designed to cover the overall liability of a corporation or firm. In some cases it covers as excess of underlying insurances and where there are not underlying insurances it covers over a self-insured retention on the part of the corporation.

Q. Does this policy have a commonly accepted trade name in the marine insurance industry? A. Yes, sir, it's called a bumbershoot.

Q. Could you explain to the Court what in marine insurance lingo a bumbershoot is? A. A bumbershoot, I don't know the derivation of the word, in the liability business in general there are policies called umbrellas which are written for companies which are similar contracts covering overall liability of the firm. A bumbershoot is an umbrella written for a corporation whose principal business is marine operator.

Q. Prior to the issuance of the policy which is Exhibit A, was there, in effect, a predecessor policy?

For purposes of refreshing your recollection I would like to show you a document which has been marked at (13) pre-trial discovery depositions as Plaintiffs' Exhibit 2 of October 5, 1971. A. Yes, sir.

This would appear to be the policy which this one renews.

Q. That is, Exhibit A was a renewal of this prior policy which is Plaintiffs' Exhibit 2? A. Yes.

Mr. Kalaidjian: Your Honor, I would like to offer this policy, D. E. 1751 as a predecessor policy.

The Court: Any objection?

Mr. Davis: No.

The Court: It's received.

Mr. Davis: Merely tell me the date of inception.

The Court: October 5, 1971.

Mr. Kalaidjian: That is the date it was marked on the deposition. I will give the date of inception.

The Court: I thought that was it.

(Defendant's Exhibit B received in evidence.)

Q. Referring to Exhibit B, Mr. Blackman, what was the term of that policy? A. 13 August 1963 to 13 August 1964.

Q. Then sometime prior to August 13, 1964, was that (14) policy, Exhibit B, up for renewal? A. Yes, sir.

Q. Did you have any discussions with anyone at the firm of Frank B. Hall and Company about the renewal of that policy? A. Yes, sir.

Q. In the marine insurance business, is the renewal of a policy automatic? A. No, sir.

Q. That is, each renewal is the subject of fresh negotiation? A. Normally, yes, sir.

Q. Did you prepare a memorandum of any discussions that you had with Mr. Lucey concerning the possible renewal of Exhibit B? A. Yes, sir.

Q. Can you identify this document, which I am handing you? A. Yes, sir. That is a memorandum to the Executive Vice-President of the company concerning the renewal of this particular contract.

Q. By whom was it prepared? A. By myself.

Q. What's the date of it? (15) A. August 11, 1964.

Mr. Kalaidjian: I offer this memorandum as the next exhibit.

Mr. Meshel: I object to it, your Honor.

The Court: On what ground do you object?

Mr. Meshel: I object on the grounds it's hearsay, this witness is here before us, there has been

no foundation laid to accept the admissibility of any statements by this other party.

The Court: Let me take a look at the memorandum.

(Document handed to the Court.)

The Court: Where did this document come from?

Mr. Kalaidjian: Shall I ask the witness that?

The Court: Yes, ask the witness where this document came from.

The Witness: It was part of the files of our underwriting files.

The Court: Looking at this document, you can say this was the memorandum you sent to Mr. Osborn, is that correct?

The Witness: It's a copy of it, sir, yes.

The Court: Do you have any recollection of the contents of this other than having seen this memorandum?

The Witness: After reading it, yes.

(16) The Court: But it was written at the time a renewal came up, you are sure of that?

The Witness: Yes.

The Court: I will receive this.

Mr. Meshel: Can we find out where the original of that is, your Honor?

The Court: You can ask that question, sure.

(Defendant's Exhibit C received in evidence.)

The Court: I take it this was in the nature of an inter-office memorandum.

The Witness: Yes, sir.

The Court: Mr. Osborn was in your office?

The Witness: He was in Chicago.

The Court: So far as you know, the original of that memorandum would be in the Chicago office?

The Witness: Yes. It should be in the Chicago office of American Manufacturers.

Q. In your conversations with Mr. Lucey concerning the issuance of a new policy, in August of 1964, was there any discussion of a renewal application? A. Yes.

A. We asked him for one. We asked the firm for one.

Q. Did he undertake to furnish one? A. Yes, sir.

(17) Q. And subsequently did you receive from the Hall firm an application? A. Yes, sir.

Q. Did the Kemper Group companies have a form of application? A. Yes, sir.

Q. Would you look at this document, please, which has previously been marked at a pre-trial deposition as Plaintiffs' 1 of October 5, 1971, and tell me if you recognize what that is.

(Handing to witness.)

A. Yes, sir, that is the renewal application for the bumbershoot in question.

Q. Do you recognize the signature on it? A. Yes.

Q. Whose signature is it? A. Mr. Lucey.

Q. There are certain penciled notes on the first page of this document. Can you tell me whose hand those notes are in? A. Yes. This was a Mr. Wendell Moore, who was a casualty underwriter employed by the Kemper Group. The procedure at that time for the renewal of bumbershoots, or the issuance of any bumbershoot, was to get the approval (18) of the casualty department inasmuch as some facets of this policy covered non-marine as well as marine insurance.

Q. What facets of the policy would you say were non-marine? A. Would you like me to use this to answer the question?

Q. Yes. A. There are a number of questions in the bumbershoot, some of which relate to marine insurance and some of which relate to non-marine insurance. Question 9, for example, asks for amounts on automobile insurance and P. I. and P. D.

Q. Is automobile one of the non-marine risks that was inquired about? A. Yes, sir.

Q. Were there any other non-marine risks inquired about? A. Yes, sir. Question 10 included an inquiry in regard to workmen's compensation insurance which is not a marine coverage.

Q. What about the rest of the questionnaire? What's that addressed to? A. Some of the other questions in the application could relate to non-marine insurance as well as marine (19) insurance. Question 6 asks about lease property for which the applicant is responsibile on shore.

Mr. Kalaidjian: Before we go on with this, I would like to offer the questionnaire as the next exhibit.

The Court: Any objection, gentlemen?

Mr. Davis: No.

Mr. Meshel: None.

The Court: It will be received as Defendant Exhibit D.

(Defendant Exhibit D received in evidence.)

Q. In addition to the non-marine risks that were referred to in this questionnaire, was there information provided here concerning marine risks? A. Yes, sir.

Q. How many vessels were involved in connection with the marine risks? A. The application shows 17 vessels.

Q. Were they ocean-going vessels? A. I believe they all were ocean-going vessels. I am not sure.

Q. You can't tell from looking at that? A. I know the majority were, but I can't tell that they all were.

Q. What sort of underlying coverage was described (20) in the questionnaire in respect of these vessels? A. The application shows that they had the mild protection and indemnity insurance, that London P and I Club.

Q. Was there any reference to any underlying Hull insurance? A. I believe there is. I will have to find it. (Pause.) Yes, yes 6 asks for the amount of Hull insur-

ance in the carrier, and the answers are given in the application.

Q. You mentioned a little while ago that the issuance of a bumbershoot was cleared as to non-marine risks with Mr. Wendell Moore? A. Yes, sir.

Q. What was the procedure in terms of who did that? Was that done by the Hall firm or was that done internally by the Kemper Group? A. That was done by myself, or one of my assistants.

The Court: Where was Mr. Wendell Moore? Was he here in New York or was he in Chicago?

The Witness: He is deceased. He was in New York at the time.

The Court: So that was done in New York?

The Witness: Yes, in the New York office.

Q. Mr. Moore is since deceased? A. Yes, sir.

(21) Q. Did Mr. Moore have any direct dealings with Mr. Lucey about this renewal? A. No, sir.

Mr. Meshel: I am going to object, your Honor.

The Court: He answered he didn't.

A. Not to my knowledge, no, sir.

Q. What department of the American Manufacturers did deal with the Hall firm on the renewal of this policy? A. The Marine Department.

Q. Exclusively? A. Yes.

Q. Is there a date under Mr. Moore's notes? A. Yes, sir.

Q. What's that date? A. 8-12.

Q. Is there a year? A. No, sir. There is no year.

Q. When was Policy D.E. 3540 issued, that being Exhibit A? A. The date that was physically issued?

Q. Yes. A. I assume it was done on the 18th of August, 1954.

Q. Is that the date which appears at the foot of the first page of the policy? (22) A. Yes, sir.

Q. What was the term of Exhibit A? A. 13 August 1964 to 13 August 1965.

Q. Did you have any discussion with Mr. Lucey about the premium for Exhibit A? A. Yes, sir. I had some notes on telephone notes concerning the renewal of the risk.

Q. What was the substance of those discussions? A. I would have to look at the notes to recollect.

Q. Do you have a copy of those notes? A. I believe I have them in my file there, yes, six. (Pause.) I have some pencil notes here dated July 31, 1963, with a note of my conversations with Mr. Lucey.

The Court: Would you like those marked for identification, the notes?

Looking at those notes I take it refreshes your recollection, does it, sir?

The Witness: Sir?

The Court: Looking at those notes refreshes your recollection about this telephone call?

The Witness: It would be my only recollection of the call, sir.

The Court: Then mark it for identification.

(23) (Defendant's Exhibit E marked for identification.)

Q. Don't these notes, Exhibit E, refresh your recollection as to the amount of the premium for Policy #D.E. 3540? A. Yes, I can only recite what's shown in my notes.

Q. What was the premium for the policy? A. Which policy?

Q. D.E. 3540, which is Exhibit A. A. $7,500.

Q. Is that the same as the premium had been for the preceding policy, which was Exhibit B? A. Yes.

Q. In your discussions leading to the issuance of Exhibit A, in your discussions with Mr. Lucey did he

convey any information to you about any overloading of any of the vessels named in the questionnaire as to which he was seeking insurance? A. No, sir.

Mr. Meshel: Objection.

Q. Did you receive any written communication at any time from the Hall firm concerning any overloading of any of the vessels which he was seeking to insure?

The Court: I will sustain an objection to the [form] of the [question].

(24) Mr. Davis: Yes, that's what I was rising to.

The Court: Did you have any discussions with Mr. Lucey as to what these vessels listed in that policy were going to do, where they were going, and what kind of cargos they were going to carry?

The Witness: No, sir.

The Court: No conversations of that kind?

The Witness: No, sir.

The Court: Very well.

Q. Was there any discussion with Mr. Lucey of any nature dealing with the subject of overloading of any of these vessels?

Mr. Davis: I think—

The Court: Again, I think he has answered the question but I will let you ask him the question, did you have any discussions with Mr. Lucey as to the cargos or whether they were going to be loaded and such matters. I think you already said you didn't. is that correct, sir?

The Witness: That's correct.

The Court: Okay.

Q. Did anyone on your staff, to your knowledge, receive any such information from Mr. Lucey?

Mr. Meshel: Objection.

The Court: I will let him answer if he knows.

(25) A. No, sir, I know of no communication in that regard.

Q. Mr. Blackman, as a marine underwriter of some experience are you familiar with a term in the marine insurance industry, "Uberrimae fidei"? A. Yes, sir.

Q. In the marine underwriter industry, does that term have a generally understood meaning?

Mr. Davis: Your Honor, I object to that.

The Court: I think—

Mr. Davis: He is going to decide what you are required to decide.

The Court: This word, whatever it is, is it used in the policy?

Mr. Kalaidjian: It is not used in the policy. You will find it replete in the cases and in the texts on insurance.

Mr. Davis: That's right.

The Court: Then I will sustain the objection. You can tell me the cases. "Fidei" means faith. What the other word means, I am not sure.

Mr. Kalaidjian: Utmost good faith.

Mr. Davis: I will agree with Mr. Kalaidjian on that, your Honor.

(26) Mr. Meshel: We should get a Latin interpreter in here, your Honor.

Mr. Kalaidjian: Did your Honor rule that he—

The Court: I sustain the objection. Counsel has agreed the word means utmost good faith, and he will stipulate to that.

Q. Mr. Blackman, can you state how this concept relates to marine insurance?

Mr. Davis: This is objected to, your Honor.

The Court: I will sustain the objection to that.

Mr. Kalaidjian: This is not a jury trial, and the concept of utmost good faith, his knowledge of it—

The Court: I don't find anything in the policy that says anything about that.

Mr. Kalaidjian: I will go into that.

Q. Mr. Blackman, in the negotiation for Policy D.E. 3540, in what capacity were you acting for the American Manufacturers Group? A. As their underwriting officer.

Q. What department were you in charge of? A. The Ocean Marine Department.

Q. Did you have any functions or duties at American Manufacturers other than those in connection with (27) the Ocean Marine Department? A. No, sir.

Q. Were you basically an ocean marine underwriter? A. Yes, sir.

Q. How long had you known Mr. Lucey in 1964? A. I believe I came to New York from Baltimore about 1953. Since that time.

Q. You have known Mr. Lucey since 1953? A. Yes.

Q. In what capacity did you know Mr. Lucey? A. As a marine broker, a placer of risks.

Q. A placer of marine risks? A. Yes.

Q. Did you know him in any other industrial capacity? A. No, sir.

Q. At the time that policy, D.E. 3540 was issued, had American Manufacturers received from the Hall firm any information as to whether or not there had been any overloading of any of the vessels sought to be insured?

Mr. Davis: That is leading and on a critical point.

The Court: I will let him answer the question if he received any information.

A. No, sir.

(28) The Court: You say you don't know they received any information, is that correct?

A. That's correct, I don't know, yes, sir.

Q. Had you personally received any information? A. No, sir.

Q. Was there anything in the file to indicate the receipt of any such information? A. No, sir.

Q. Did anyone besides the Hall firm participate in any negotiations with you concerning the issuance of this Policy D.E. 3540? A. You mean outside of our—

Q. Other than Lucey, anyone from the Hall firm other than Lucey? A. Not to my knowledge, no, sir.

Q. In 1964, was there in the marine insurance industry any commonly held attitude concerning the acceptability of overloading vessels as marine risks?

Mr. Meshel: Objection.

The Court: I am going to sustain the objection to that question. I think you can ask the witness whether in negotiating any of these—what do they call these policies—

The Witness: Bumbershoot.

The Court: —in negotiating these policies in (29) behalf of American Manufacturers, did you ever discuss with any of your pending insured, the applicants for insurance, the nature of their business, the cargos they carried, and that kind of thing? Did you ever do that?

The Witness: No, sir.

The Court: You never did it?

The Witness: In this particular case?

The Court: In any case, in any case where you were issuing bumbershoot policies would you talk to the broker or the principal?

The Witness: Yes, we might ask them the nature of the cargo.

The Court: The ports they were sailing to and from, and what kind of trade, you might ask them?

The Witness: In a matter of general inquiry, to get a feel of the business, yes, sir. It would be more a matter of—

The Court: That is not unusual for you to do that?

The Witness: It would be not unusual, yes, sir. In this particular case, if I can say so, we were Hull underwriters on this fleet, my company, besides having written the bumbershoot, we were Hull underwriters, so we were familiar with the fleet and, therefore, wouldn't have any (30) reason to make any specific inquiry as to the cargos they were carrying or what they were doing.

The Court: You were familiar with the fleet?

The Witness: Yes, sir.

The Court: What exactly did you mean by being familiar with the fleet? Of course, that wasn't your department, was it, that would be the Hull department?

The Witness: I was in charge of that, too.

The Court: You were in charge of that, too?

The Witness: Yes, sir.

The Court: So you had some knowledge of the fleet at the time of these policies?

The Witness: Yes, sir.

The Court: What knowledge did you have?

The Witness: We had knowledge from the loss experience as operators, from our books, Lloyds Index, showing when they were built, and their age, and primarily on the basis of their loss statistics.

The Court: In other words, their record?

The Witness: Yes, sir. Their record with us, yes, that's right.

Q. You mentioned that your firm was the Hull underwriter of the fleet. What was the extent of the interest that your firm had as a Hull underwriter on the fleet? (31) A. I don't remember the percentage. It was rather small. As Hull underwriters—it might show up on the

bumbershoot here—as Hull underwriters we generally follow the American Hull Syndicate. The bumbershoot application shows the Independent American Companies, of whom we were part, had 19 percent, and what percentage American Manufacturers had, I don't recall.

Mr. Kalaidjian: Would you mark this letter for identification, please?

(Defendant's Exhibit F marked for identification.)

Q. Does Defendant's Exhibit F refresh your recollection about that? (Handing to witness.) A. Yes.

Q. What's Exhibit F for identification, if you can identify it? A. It's a memorandum from Mr. Alvey, who was the Claims Manager at the time, to one of our reinsurers, notifying them of the total loss of this vessel.

Q. And does the letter indicate the percentage interest that American Manufacturers had in the Hull insurance? A. Yes, sir. The letter shows that American Manufacturers had three percent interest on the vessel. (32) Q. And the rest of the Hull insurance was placed in other markets? A. Yes.

Q. Who was the lead on the Hull insurance? A. The American Hull Syndicate.

Q. Could you tell the Court generally what the American Hull Syndicate is? A. The American Hull Syndicate is a group of mostly stock insurance companies formed together for the writing of marine insurance, marine Hull insurance.

Mr. Meshel: Is this Kemper he is talking about?

Mr. Kalaidjian: No, he is telling the Court what the American Hull Syndicate is, which is the lead on the Hull policies.

Mr. Meshel: I am sorry.

Mr. Kalaidjian: I offer Exhibit F in evidence.

The Court: Any objection, gentlemen?

Mr. Davis: None, your Honor.

Mr. Reid: I haven't seen it.

(Pause.)

Mr. Reid: No objection.

Mr. Davis: What's the date of that, Mr. Kalaidjian?

Mr. Kalaidjian: December 31, 1964.

The Court: All right, Exhibit F will be received.

(33) (Defendant's Exhibit F received in evidence)

Q. Did you receive from the Hall firm or any other source any information as to the specific cargo which any of the vessels listed in the questionnaire were carrying?

Mr. Meshel: Can I have a point of time?

Mr. Kalaidjian: In the negotiations with Mr. Lucey leading to the renewal policies in July and August of 1964.

A. Can I have that question again, please?

The Court: I think I already asked you that question. Did you have any discussion with Mr. Lucey in connection with the renewal of this policy as to the nature of the cargos that were to be carried on these vessels? I think you told me no.

A. No, I didn't.

Q. Did you receive any information from Mr. Lucey as to the ports of call that these vessels would be making or had been making? A. No, sir.

Q. Mr. Blackman, as a marine underwriter of some year's experience, have you ever knowingly issued a marine policy on any vessel that had been or was operating overloaded?

Mr. Meshel: Objection.

Mr. Davis: I object to that.

(34) The Court: I think I will sustain the objection to that. I think I can anticipate his answer on that.

You do tell me on some occasions you do discuss with the insured or their broker the nature of their business, but in this case you did not, is that a fair statement?

The Witness: Yes, sir. Normally, when we have a new—this is a renewal of a line on which we had been for sometime, we were familiar with it—it was one of the better known fleets in the U. S. and in view of that we wouldn't make any specific inquiry as to what they were doing.

Q. Is it the practice in the placing of marine insurance for the underwriter to talk directly to the prospective insured about the risk? A. No, sir.

Q. With whom did you deal? A. Marine brokers and/or agents.

Q. That is, you deal with the prospective insurance broker? A. Yes.

Q. Is he your principal source of information about the risk? A. Yes.

Q. In dealing with a marine broker, do you expect (35) to receive only that information which you specifically request?

Mr. Meshel: Objection.

The Court: I think that is sort of a—I think I will sustain the objection to that question.

You always ask for a questionnaire, is that right, in these policies?

The Witness: No, sir.

The Court: Not always?

The Witness: No, sir.

The Court: But you did in this case.

The Witness: It was our practice, it was the company's policy at that time to insist on a bumbershoot application for all bumbershoots.

The Court: For your bumbershoots?

The Witness: Yes.

The Court: That was your regular practice?

The Witness: Yes.

The Court: And when you received the questionnaire back from the bumbershoot, did you ever ask any more questions or was it—

The Witness: We could ask more questions, yes, sir.

The Court: If you weren't satisfied with what (36) you had?

The Witness: Yes, sir.

Mr. Kalaidjian: If your Honor pleases, this question relates to industry practices which are a fact to be proved.

The Court: He is testifying as to his experience, I take it, and at the time his experience was in the marine department of the American Manufacturers Mutual.

Mr. Kalaidjian: I think he testified to experience which antedated that with several companies.

The Court: I understand.

Mr. Kalaidjian: I was trying to bring out factually what the industry practice is in the negotiation of marine insurance between marine underwriters and brokers.

The Court: I think he has covered that. What further question do you want to ask him?

Mr. Kalaidjian: The point I am trying to bring out—

Mr. Meshel: May I interrupt?

Mr. Kalaidjian: If I may, in marine insurance there is more than just the duty to respond to questions. The burden is on the insured to come forward with any (37) information concerning the risk.

The Court: As I understand the witness, he told us that he conducted his negotiations with the broker,

he didn't conduct them directly with the insured. Am I correct in that?

The Witness: Yes.

Mr. Kalaidjian: The information funnels as a matter of practice through the broker. The point I am getting at with these questions is the industry practice—indeed, it's more than a practice—that the burden of proving—of producing information material to the risk is on the side of the person procuring the insurance, it isn't just a matter of responding to questions.

The Court: I would take it from his testimony he says he deals with brokers and he sends the broker or gives him a questionnaire, is that right?

The Witness: Not in all cases, no, sir.

The Court: Not in all cases, but where you do give the broker a questionnaire the questionnaire comes back filled out by the insured, I suppose.

The Witness: It could be filled out by the broker as his agent.

The Court: Or by the broker as his agent.

The Witness: Yes, sir.

(38) Q. Mr. Blackman, would you explain, please, how in practice underwriting negotiations work between a marine underwriter and a broker in respect of the vessel of information pertaining to the risk of the insured?

Mr. Reid: I object, your Honor. We are talking about this case.

The Court: I think I will let him answer the question on these bumbershoot policies. How did you go about at that time handling a bumbershoot policy? You can tell us that. How did the first come to your attention, and tell us what you do.

The Witness: This was a renewal of a pre-existing policy. It was the company's policy at that time, practice, to insist on an application, a questionnaire to be completed in connection with all new or renewal bumbershoot policies.

In this particular case, we followed the th —existing company policy and had the questionnaire filled out by the broker. The application was then submitted to Mr. Moore, of the Casualty Department, for his approval or disapproval of any on-shore exposures. It was then submitted to the Executive Vice-President in Chicago for his approval.

Q. Was the action which the American Manufacturers took in issuing Policy # D.E. 3540 based principally upon the (39) information which was provided by the broker in Exhibit D, the questionnaire? A. Yes, sir.

Q. Do you know of any other information that the Kemper Group had received from the Hall firm at the time the decision was made about the issuance of this policy? A. On this risk?

Q. Yes. A. No, sir.

Q. It's all contained in that questionnaire? A. To the best of my recollection, yes, sir.

Mr. Kalaidjian: That's all, your Honor.

The Court: Why don't I just go down the group. Mr. Reid, any questions?

Mr. Reid: No questions, your Honor.

The Court: Mr. Davis?

Mr. Meshel: Your Honor, I wonder if you would entertain a five-minute recess. We have never seen this witness before.

The Court: Fair enough.

Recess.

(Recess taken.)

John Blackman, for Defendant, Cross

The Court: Gentlemen, on the cross examination (40) I told Mr. Davis I would take any order you wanted to proceed as long as you're consistent. If you want to start with Mr. Meshel, that is fine with me.

Cross Examination by Mr. Meshel:

Q. Now, Mr. Blackman, can you tell us what your staff at the Kemper Group at the Ocean Marine Department consisted of, and who were the people that were involved?

The Court: I think you are asking about three questions. Involved in what? Are you asking how big the staff was?

Q. You said you were head of the Ocean Marine Department, is that right? A. Yes, sir.

Q. Were you the only one in your staff?

The Court: He wants to know how big your department was. How big was your department?

The Witness: At that time I think it was about thirty people.

Q. Can you tell us what these thirty people did? A. Yes. They were claims adjusters, underwriters, people that took charge of collecting premiums, people that wrote policies.

Q. Let's talk about the people that wrote policies. (41) I take it that whenever you had a new risk come in or whenever you were considering a renewal you had to make an assessment as to the risk, is that right? A. Personnally?

Q. Yes. A. Not personally, no, sir.

Q. You had nothing to do with the assessment of the risk? A. No, that's not correct. You stated that on every risk that came in did I make a personal assessment, I did not.

Q. Did you make a personal assessment on the Smith Voyager Insurance? A. Yes, because at that time I had instructions from the management to take charge of all bumbershoot underwriting.

Q. So you were personally involved, I take it, with the assessment of the risk on bumbershoot policies back in 1964, is that correct? A. Yes, sir.

Q. Did you have people assisting you in attempting to assess the risks involved on bumbershoots? A. Yes.

Q. That's really what I was asking for. Who were (42) the men who worked with you and what functions— A. As I said, at the time on bumbershoots I was—by management I was the only one that was to do any underwriting on bumbershoots, with the help of Mr. Wendell Moore and with the final approval of management in Chicago.

Q. Did you have any technical people on your staff, maritime technical people? A. No, sir.

Q. Did you ever attempt to use the services of any technical people of any kind in either the initial taking out of the policy back in 1963 or the renewal of the policy in 1964? A. The only technical people would have been Mr. Moore on the casualty side, if you can call him technical.

Q. I take it you testified, didn't you, Mr. Blackman, that at the time the company renewed the bumbershoot you were personally aware of the operation of the Smith vessels? A. I was aware in a general sense in that the fleet was a well-known fleet in the market. I mean my awareness was of a general nature.

Q. I think Judge Bonsal asked you if you were aware of the types of cargos and the types of voyages and (43) I believe you said that you were aware, is that right? A. I would assume—I have to assume that the vessel, an American flag vessel is being engaged in a normal trade of bulk cargos, or whatever happened at the time.

John Blackman, for Defendant, Cross

Q. I believe you testified that you had technical portfolios or manuals available to you, such as Lloyds' lists? A. We would have a Lloyd's confidential, register which would show the ships, when they were built and by whom they were classified, the classification society.

Q. Their tonnage? A. Their tonnage, yes, sir.

Q. Their dead weight? A. Yes. Gross, and so forth.

Q. Specifics of the vessel? A. Yes, that's right.

Q. Would it also have the age of the vessel, when it was built? A. Yes, sir.

Q. You would have to know that in assessing the risk? A. It was one of the considerations, yes, sir.

Q. Did you also get the Lloyds' lists to come in (44) which showed the weekly information where the vessels were, and so forth. Was that the normal type of booklet you would get in the company? A. Yes, we had that.

Q. What about the Journal of Commerce, did you have things like that? A. We subscribed to the Journal of Commerce.

Q. And these publications, I take it, showed generally speaking, the ports the vessels call at, the amount of cargo they lift, etc., etc. A. No, sir, they don't, the Lloyds' Index shows the—does not show the cargo being carried other than I think it makes a difference between tankers and other types of vessels. It does show where the vessel last called.

Q. It would show a bunkering call? A. No.

Q. If it bunkered at Freeport and tied up it would show in Lloyds? A. I don't know whether it does or not.

Q. In addition to Lloyds and the Journal of Commerce were there any other publications you people relied upon? What about the American Bureau of Shipping, any reports that they had? (45) A. No, sir. We had the American Bureau of Shipping books, I believe at that time.

Q. All right. They were available to you, and that's one of the things you might have used on assessing the risk, is that right? A. Not necessarily on a bumbershoot

risk, no, sir. On a Hull risk where we might be the lead underwriter taking a large line and where we wanted to pay particular attention to construction, age, and so forth, we would then begin to refer ourselves to those manuals. When we were an underwriter and we were taking a line following a well-known, well established and reputable market, we more or less accepted that line on the basis of the American Hull Syndicate's acceptance.

Q. So that you are saying with regard to the Hull insurance, as distinguished from the P and I insurance, that there usually is some sort of technical assessment made by the lead underwriter in a Hull policy? A. That's correct.

Q. And I believe you said that the American Hull Syndicate, did you say, was the lead? A. Yes, that's right.

Q. And Kemper followed the lead of the American Hull Syndicate in this particular ship, e. g., the Smith (46) Voyager? A. In regard to the Hull insurance, yes, sir.

Q. We are only talking about the Hull insurance now. A. Yes.

Q. And you had a potential risk, meaning you as Kemper, on the Hull. A. Yes.

Q. For the Smith Voyager? A. Yes.

Q. For which American Syndicate was the lead underwriter? A. Yes.

Q. Did the Hull Syndicate or Hull companies meet periodically to make annual assessments on risks? A. Did we meet with the syndicate, no, sir.

Q. Did underwriters in general meet? A. No. It's illegal. No, no, sir. The syndicate did their underwriting. We did not meet with our co-underwriters.

Q. Did you have any say in the assessment of a premium on the Hull policies? A. No, sir.

Q. You simply put your name on the list and let them charge whatever they wanted, is that your testimony? A. No, sir.

(47) Q. Tell us how the risk was arrived at. A. I thought I did. The American Hull Syndicate accepted—I don't know what their percentage in this particular fleet was, it's usually 25 to 75 percent. Before they accept the risk they have U.S. Salvage Association, I assume, check the vessels out, they check their records, they check the managing, and after doing that their committees assess the premium.

If we wish to participate in the risk we do so. Our underwriting in a Hull risk of this case is purely a yes or no proposition. We either accept following the syndicate or we don't get it.

Q. There is a participation, but you are saying in this particular case since you had a small exposure your participation wouldn't be as strong as it was, e. g. if you had a 90 percent part of the Hull insurance, is that right? A. No, sir. I say we accepted our line purely on the basis of the underwriting done by the American Hull Syndicate.

Q. You accepted American Hull's assessment? A. Yes, sir, that's correct.

Q. And their assessment was made, generally speaking, on technical matters, the stage of the voyages, where she went, the amount of cargo the vessels carried—(48) A. I don't know the deliberations that went into their acceptance of the risk. I don't know.

Q. You say it was a standard policy of the Kemper Group on bumbershoot policies back in '63, '64, to require that the potential assured fill out what is known as a questionnaire for bumbershoot policies, is that right? A. Yes, sir.

Q. I believe you said that Exhibit D was the questionnaire you sent out, is that correct? A. Yes, sir.

Q. Who in your company was responsible for drawing up this questionnaire, this standard questionnaire? A. I don't remember. I really don't.

Q. Was it you? A. I think it might have been purloined from a London questionnaire form and our name put on it. I am not so sure how original it really was.

Q. What was your company's purpose in issuing such a questionnaire? Was it to get the important, salient facts that you needed with regard to the risk? A. Yes, sir.

Q. And did you think it was important, for example, to list the potential areas that the vessel would be calling (49) at, North Am. South Am, World Wide, etc.? A. No, sir.

Q. You didn't think that was important? A. No, for this reason, reverting to the Hull insurance for a minute—

Q. No, we are talking about P & I. A. I know, but I have to revert to Hull to answer your question. They were referring to trading. The Hull specified they can trade only in certain areas and not trade in other areas.

Q. Was there any area limitation on the P & I insurance? A. I don't know, sir.

Q. The answer is you don't know? A. This is not a P & I policy. I don't know what the P & I policy said.

Q. Was there any limitation placed on the bumbershoot, an area limitation, to your knowledge? A. Not to my knowledge.

Q. So the vessels could go anywhere they wanted to in the world? A. Yes, sir.

Q. And you would still insure them? A. I would so, yes.

(50) Q. Did you ever put any restrictions in the policy or did you ever ask any questions in the questionnaire about the amount of cargo over which they couldn't carry, which they were not permitted to carry, over which they couldn't carry?

The Court: I don't understand the question.

John Blackman, for Defendant, Cross

Q. Was there ever any limitation on the amount of cargo any ship could carry under the policy?

Mr. Kalaidjian: I object to the question as vague.

The Court: The question is, is there anything in the questionnaire or the policy which limits the amount of cargo any of the vessels covered in the policy could carry?

A. In the bumbershoot policy.

The Court: Or in the questionnaire?
The Witness: I don't believe, no, sir.

Q. Was there a Mr. Krueger in your outfit? A. Yes, I think there was.

Q. What was Krueger's job? A. He was—he died, too. He worked with Mr. Moore, I believe, in—either was assistant to Mr. Moore, or coordinated his activities with Mr. Moore.

Q. Did he work with you? A. I don't think so. He was one of the persons (51) to whom we went for advice concerning the casualty or non-marine segments.

Q. I don't understand your question. You don't think so. Did he work with you or didn't he work with you? A. When you say worked, with me or for me or what?

Q. Either way. With you, for you? A. With us, yes.

Q. Did he work for you? A. No.

Q. He didn't do any marine work.

The Court: He didn't say that.

A. He was an advisor to the marine department on non-marine segments of bumbershoot policies.

Q. So so far you had two men, Mr. Moore and Mr. Krueger, and you say both of those men were non-marine men? A. Yes.

Q. They weren't concerned at all with any of the marine aspects of the bumbershoot policies? A. They

didn't know anything about marine business as far as I knew.

Q. And you were the only one there on the marine side, is that right? A. At this stage, as I have said before, I was the (52) only one authorized by management to negotiate bumbershoots.

Q. That's not the question I asked you. Were you the only one—

The Court: I think he has covered it.

Mr. Meshel: I don't think he has, and I wonder if I can pursue it once more.

Q. Were you the only one concerned or that worked in any way in ascertaining the marine risk for this particular bumbershoot policy, yes or no? A. Yes, sir.

Q. And you had no staff to assist you, you worked alone on the marine aspect of the bumbershoot?

The Court: Let's not go into that.

A. I really don't remember—

The Court: Wait a minute. What difference does it make? He says he did it.

Mr. Meshel: I can suggest two particular areas. One is whether he was the only one who may be called by Lucey or others with regard to the claim of non-disclosure. That is one particular area.

The second area in the answer he gave me, he has given me inconsistent answers.

The Court: It's speculative. He says he negotiated the renewal with Lucey and handled the marine (53) insurance.

Q. Did the Kemper Group start this application business on any particular year or any particular date or did they always have an application requirement? A. No, sir, they started it sometime prior to the renewal of this policy.

Q. Was there a reason for that particular requirement? A. Yes.

Q. What was it? A. We had a very serious bumbershoot claim involving a non-marine exposure, and it was management's desire because of that occurrence that all applications—that we insist on application for bumbershoot, and they be submitted to a casualty or a non-marine underwriter for his approval and then subsequently approved in Chicago by chief management.

Q. Did your company disclaim in that case, too? A. I believe they—I don't know whether they are disclaiming now. I don't really understand your question.

Q. Assume they are disclaiming in this case. Did they disclaim in that other case as well?

Mr. Kalaidjian: I object. What their position was in another case has no relevance.

(54) The Court: I will let him answer.

A. I believe they did.

Q. Do you know an Admiral Hepburn? A. I know of him, yes.

Q. Who is Admiral Hepburn and how did he fit into the Kemper organization? A. I know very little about Admiral Hepburn. I believe he is an attorney. I left the Kemper Group in 1964 or '65, and I understood—Admiral Hepburn called on me at one time in my new office and asked me some questions about something or other. At the time I was employed by Kemper Group I didn't have contact with Admiral Hepburn.

Q. Who was the underwriter who initially assessed the premium of $7,500 a year at the time the original bumbershoot was taken out? A. I don't know.

Q. Is there anything in the file to indicate what his basis was in assessing that premium? A. I don't know.

Q. I take it when you said the policies renewed you used the term renegotiation, is that right? A. I don't know, sir.

Q. Did you use the term renegotiation or fresh (55) negotiation? A. Whatever is written down there is my recollection of the conversation. I don't know anything more than that, really.

Q. Is it your testimony today when a policy is renewed there are fresh negotiations? A. That's correct.

The Court: I think he testified to that.

Q. On assessing the premium on the renewal of $7,500, what facts did you consider in making that assessment of $7,500? A. The information contained in the application.

Q. Anything else? A. I don't know whether the overall loss experience from the class was a consideration.

Q. Do you know what the loss experience on this class was before the renewal? A. No, sir.

Q. Did you have any other bumbershoots to fall back on to have an idea whether $7,500 was too much, not enough, or what? A. Yes, sir, I think we did.

Q. What's that? A. Yes, I'd say we did.

(56) Q. What did you use in assessing the $7,500 figure? A. I can only surmise that was based upon the number of marine vessels involved in the operation. It would be primarily based upon that.

Q. Would it also be based upon the number of aircraft? A. Not normally under a bumbershoot because if it assured aircraft for such non-marine exposure you wouldn't have written a bumbershooot.

Q. What about on the amount of shoreside personal injury? A. Not normally, because the didn't affect—that would be a minor part of the operation.

Q. And all these minor parts of the operation, as you claim, you asked for Krueger and Moore to give you an assessment on the risk? A. Those are instructions from management, yes, sir.

John Blackman, for Defendant, Cross

Q. Who was the Executive Vice-President that ultimately okayed the issuance of this bumbershoot? A. Mr. Osborn.

Q. To your knowledge, did Mr. Osborn have any conversations with Mr. Lucey? A. It would be highly unlikely for him to have any.

Q. Did you have any personal knowledge whether he (57) personally spoke to Mr. Lucey? A. I don't have any knowledge.

Q. You don't know? A. No, sir.

Q. Do I take it from your testimony, Mr. Blackman, you are pretty much relying upon the notes which have been introduced in evidence to refresh your recollection? A. Yes, sir.

Q. And you have no recollection of your conversations with Mr. Lucey today? A. I would say that is a correct statement, yes, sir.

Q. And if there were any conversations you may have had with Mr. Lucey that weren't recorded then you would have no way of recollecting those conversations, is that right? A. I think that is a fair statement, yes, sir.

Q. So there may have been some conversations which you haven't recorded which you may have had with Mr. Lucey with regard to the operation of the Smith vessels? A. I don't know.

Q. What does that mean? A. I don't know.

Q. After you received the questionnaire from Mr. Lucey, did you ever have any personal conversation with him (58) with regard to the contents of that questionnaire, Exhibit D? A. I don't recall.

Q. Let me refer you to item #10 on Exhibit D. Would you read into the record what that says? A. Item 10, the question apparently is, "Detail liability loss insured or uninsured, settled or pending, exceeding $25,000 in the last five years."

John Blackman, for Defendant, Cross

Q. What about under #1? A. #1 says, "Refer Smith Pilot, matter, heavy weather, H.W., Bay of Bengal, 5-29-63."

Q. Do you recall what that was all about? A. No, sir.

Q. Do you know whether you discussed that with Mr. Lucey or not? A. I have no recollection of it, no, sir.

Q. Did you say, "Heavy weather"? A. H.W. I think is heavy weather, isn't it?

Q. I don't know. Do you know what it means? A. I assume it to be heavy weather.

Mr. Meshel: That's all the questions I have your Honor.

The Court: All right. Who is next? Mr. Reid?

Mr. Reid: Mr. Davis.

Mr. Davis: Mr. Reid has waived cross examination?

(59) Mr. Reid: I haven't waived it. I said I didn't have any questions at that time. I may have some questions.

Cross Examination by Mr. Davis:

Q. Mr. Blackman, do you know the meaning of the word bumbershoot? A. No.

Q. Isn't it understood in the insurance business to mean the same thing as the word umbrella? A. A bumbershoot in the industry is normally a marine umbrella.

Q. But the word bumbershoot without reference to insurance is just a colloquialism for the word umbrella, isn't that true? A. I understood the British—

The Court: It's an English expression for an umbrella.

A. But they claim they have no such expression.

Q. I just wanted to get it on the record merely if you knew about it.

John Blackman, for Defendant, Cross

Now, I should like you to help the Court with some background information as to your underwriting a risk. Let us take a risk like U. S. Steel Corporation (60) which has a lot of land based risks attached to it for purposes of excesss liability. Correct? A. Yes, sir.

Q. Now, the U. S. Steel Corporation in addition to its vast land based, so-called non-marine risks also has a great many ships and tugs and boats. A. That's right.

Q. If the broker who brokered the risk decided to bring the U. S. Steel risk to you, you wouldn't undertake to underwrite it, would you? A. Not normally, no, sir.

Q. You would send him over to Mr. Krueger or to Mr. Moore of your office? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And then what I should like you to explain to his Honor, and for the record, what share in that underwriting would you have. Would Mr. Moore and Krueger come to you and say, "Look, there are some ships involved here." A. I wouldn't have a problem because I don't think at that time the Kemper were writing umbrellas.

Q. Could you draw on your experience and tell me what the *modus operandi* would be where a risk has both (61) marine risks attached to it as well as substantial land based risks?

Mr. Kalaidjian: Is this question addressed to 1964?

Mr. Davis: Yes, if you can help us by referring to 1964. Thank you, Mr. Kalaidjian.

A. I said at that time the Kemper Group I don't believe were writing umbrellas, so I would assume that if U. S. Steel came in they would probably turn it down.

Q. I was merely trying to get at how it would be underwritten.

The Court: In other words, you are saying at the time the only umbrellas you had were the bumbershoots?

The Witness: That's correct. I don't have any intimate knowledge of the casualty workings of the Kemper Group at that time.

The Court: I think what Mr. Davis is driving at is when does a bumbershoot become an umbrella. In the Steel Company case I take it would be an umbrella. In the Smith ships case you say it's a bumbershoot. What's the line? You mentioned you have to go to the casualty company to get approval. What's the line between a bumbershoot and an umbrella? If you know the answer to that, you can give it.

(62) A. I revert to my previous statement that I think where a risk is predominantly marine one would go to the bumbershoot market, although there were—

The Court: What's predominant? Anything more than fifty percent?

The Witness: I don't think it's a question of percentage as much as the nature of the business.

The Court: If they are primarily in the shipping business and have a few trucks and a few things on shore—

The Witness: Yes, sir, that would be the bumbershoot market.

The Court: So you say if they are in the shipping business and the other is incidental, is that correct?

The Witness: Yes.

Q. Have you ever had occasion to take a policy like Defendant's Exhibit A in evidence—that's that so-called bumbershoot—and to compare it with a typical policy written for excess purposes by a person like Mr. Moore of your office? A. Yes, sir, I think I have looked them over. I don't think I made any careful analysis of the difference.

Q. What I am trying to get at, for his Honor and the record, can you tell us what are the essential (63) differences in the two bodies, the two forms of policies?

Could you explain it to us? A. No, I can't. I would say the intent is pretty much the same.

Q. In other words, the intent of the writing of excess liability policies is the same for a bumbershoot as it is for an umbrella policy, with the exception that the underwriting of it—that is, the formality of where the paper would be prepared—would be in the marine bureau of your company if a lot of ships were involved preponderantly and in the casualty side if the broker and the underwriter thought that land based risks predominated. Is that a fair statement? A. You would go to different underwriters.

Q. All right. But I am talking now about the fact that if the two undewriters produced two policies, one called a bumbershoot and one called an umbrella, and you put them on the table here, the intent behind each of those policies would be identical, is that right? A. I disagree.

Mr. Kalaidjian: Excuse me, it isn't clear to me what Mr. Davis means by the intent of the policy. It's a very ambiguous word and I object to the question.

The Witness: I would like to—

(64) The Court: Wait a minute. I think we are wasting a lot of time. The witness said in his understanding the purpose of an excess liability policy, which is non-marine, or which is marine in the form of this policy, the purpose is substantially similar, as I understand it, and—

The Witness: Yes.

The Court: And he has indicated that although he doesn't recollect very well he thinks he has looked at these policies, he has never compared them, but he indicates that certainly from a pur-

pose point of view they cover substantially the same things.

Am I quoting you correctly?

The Witness: That's correct.

The Court: I think he has covered that. I don't know how much further we can go on that.

Mr. Davis: Your Honor, at this point for the sake of the Court's and my education, I have a typical policy written for excess liability sometimes called an umbrella, in my hand. I should—

The Court: He says he doesn't know anything about umbrellas because they weren't writing them then.

The Witness: We weren't in the umbrella business.

Q. I will show you—

(65) The Court: Don't show it to him because he didn't have any experience in umbrellas.

Mr. Davis: Then I will get off that subject.

The Court: All right, thank you.

Q. I wonder if you would please look at Defendant's Exhibit A and tell the Court if the policy covered Hull risks in any way? A. It's a liability policy, and it would cover excess Hull liability.

Q. Probably excess Hull? A. Yes, sir.

Q. There are a lot of definitions of land based or non-marine risks in this policy, are there not? A. I believe so, yes.

Q. Among them would be aircraft and automobile, is that right? A. I am not sure I follow you. Yes, sir, there are definitions.

Q. And workmen's compensation. A. Yes, sir.

Q. Excess risks of workmen's compensation. A. Yes.

Q. And products liability? A. I don't know whether products liability is (66) mentioned or not.

John Blackman, for Defendant, Cross

Q. I don't want you to take the time to go through this all, but I should like you now to turn to the next to the last page of that exhibit, the one that looks like this. A. I don't think that is on here.

Q. That's strange.

(Pause.)

Q. Here it is, it's a half page. This is the next to the last page on Exhibit A.

Now, up at the top is the word "Cancelled Flat", upper right. A. Yes.

Q. Could you please explain when that was put on that exhibit and what it means? A. I have no way of knowing when it was put on. The expression normally means that a policy is cancelled from inception.

Q. And that you don't charge any premium for it? A. That's right.

Q. Do you know why that was put on there? A. I have no idea. I don't know, no, sir.

Q. Usually, that is done, is it not, in the insurance business when a request is made of an insurance (67) company to cancel the policy? A. That's correct. Yes, sir.

Q. But you cannot give us the explanation for this particular entry? A. No, I don't know when it was done. No, sir, I don't.

Q. Also, you will please note at the top line there, there is a profession for reinsurance and it says G.C. A. Yes.

Q. Does that mean—I suggest to you, does that mean general casualty? A. No, it does not.

Q. What does it mean? A. It means Guy Carpenter.

Q. He was the agent for— A. He was the re-insurance broker?

Q. He was the agent for the re-insurers, is that correct? A. Yes, sir, that's correct.

John Blackman, for Defendant, Cross

Q. Now, do you know what class 1071 means? A. No, sir. I can only guess it might have been the class for bumbershoots.

Q. Do you know how much responsibility of liability remained with your company after taking into consideration (68) all re-insurances in the writing of this five million dollar risk?

Mr. Kalaidjian: Objection, your Honor.

The Court: I don't understand the question. The question is way beyond me.

Mr. Davis: I will restate it and ask it be cancelled.

Q. What was the retention, the actual liability of your company—

Mr. Kalaidjian: Objection, your Honor.

Q. On the policy they wrote—

Mr. Kalaidjian: Entirely irrelevant.

The Court: As I recall it, this policy which I have only seen I guess it's attached to the complaint for excess liability in the amount of five million dollars, is that correct?

Mr. Davis: Yes.

The Witness: It's a five million dollar?

Mr. Davis: It's a five million in excess of two million.

The Court: What Mr. Davis is asking which you cannot answer is five million dollars in excess of what, which I suppose would mean what was the amount of the regular insurance in all forms as to which this gave excess (69) coverage in the amount of five million dollars. Do you know the answer to that?

The Witness: I am sorry, I don't follow the question.

The Court: This is an excess insurance policy of five million dollars in excess of the other ordinary insurance that the insured might collect from others?

John Blackman, for Defendant, Cross

The Witness: The bumbershoot is a two-part policy. It's designed to follow or to come after the exhaustion of underlying insurances, and if there is no underlying insurances then it steps down to a predetermined retention.

The Court: I know, but here in this case it's excess, and I think what Mr. Davis wants to know is whether you knew at the time of this what the underlying insurance was.

A. Yes, sir.

Q. Do you know what the limits of the underlying P & I coverage was? A. Yes, sir. That's contained in the application.

Q. Can you remember it? A. I think it was two million dollars.

Q. Right. A. If you have a copy of the application, it shows that.

(70) Q. And the limits for automobile, general liability, and workmen's compensation, do you remember those? A. Only by looking at the application.

Q. Do you have that in front of you now? A. That was one of the things floating around here.

Q. Could you by reference to Defendant's Exhibit D tell me what the other risks underlying your policy was? A. Well, you have to—you can't start there. You have to go back, don't you?

Q. All right. Would you please tell us? A. What would you like to know?

Q. What were the underlying insurances which had to be exhausted first before your insurance policy's liability came into play? A. Well, in respect to what particular risks? There are five underlying for five types of risks.

Q. Would you explain and read it into the record so we have it here? A. In respect to P & I risks, the application shows that it assured a two million dollar P & I policy with a London Steamship Owners Mutual.

John Blackman, for Defendant, Cross

Q. May we clear it up. What do the words P & I mean, and what does that sort of underlying insurance signify? (71) A. It's protection and indemnity.

Q. And does that mean, in plain words, the general liability that a company has in the operation of its ships? A. Not necessarily, no, sir. There are certain liabilities covered by the Hull policy.

Q. All right. Would you please explain what P & I means to the Court? A. Well, it's a very complicated question. It's a whole policy containing the type of protection that you buy under that contract, and I don't think you can answer it in two seconds. It covers certain of their marine liabilities. It excludes collision liability, it excludes deviation liabilities, it excludes various liabilities, I can't remember them all without going over the contracts.

Q. And it excludes Hull? A. It excludes certain liabilities that are covered by the Hull policy, such as collision liability.

Q. Would you please continue and give us the rest of the underlying insurances above which your policy would then come into play? A. The application also mentions that the assured carried war P & I in London, a certain amount.

He also carried Hull insurance for certain (72) values. The policy would respond for collision liabilities in excess of those amounts specified on Hull.

Q. Yes, what else? A. Automobile liabilities.

Q. Please give the limits. A. They state in the application they didn't own any cars and they carried non-ownership automobile insurance with $250,000—$500,000 limits.

Q. Go ahead. What else? A. They carried employer's liability for half a million dollars

Q. Yes? A. They carried general liability, Employee's Liability Insurance Company limits $250,000—$500,000.

John Blackman, for Defendant, Cross

Q. That's for general operations? A. No, I think that would be—the intention of that is non-marine.

Q. What else? A. I don't see anything else.

Q. You didn't mention compensation. A. Workmen's Comp.

Q. You mentioned employer's liability. A. I think that is down under the same thing, isn't it?

(73) Q. It's covered, though, isn't it, primarily? A. Workmen's compensation—I don't know.

Q. You don't know? A. I don't know from the application whether it is. I assume if they carried employer's liability they carried some kind of workmen's comp.

Q. What I would like you to say to the Court, if you know, how much of the five million dollars of liability in excess of the limits of underlying policies did your company retain as its own responsibility? A. They took the whole thing, subject to reinsurance.

Q. Would you please explain to the Court if you can remember how much of the five million dollar risk was ceded to other people who assumed that liability from you?

Mr. Kalaidjian: I object to that question as having no relevance whatsoever whether any of this insurance was reinsured or not.

Mr. Davis: May I be heard?

Mr. Kalaidjian: The only subscriber to the policy which the plaintiffs seek to enforce is the American Manufacturers.

Mr. Davis: Would your Honor permit me to be heard?

(74) The Court: Yes. What's the relevance of it?

Mr. Davis: It might be useful for your Honor to know whether the attitude in the writing of this insurance was or was not affected by the knowledge of any so-called overloadings or so-called over-deviations.

The Court: Do you know whether this policy was reassigned?

The Witness: Was reinsured?

The Court: Yes.

The Witness: Yes, sir.

The Court: All right, then answer it.

The Witness: I don't know how much. Unless there are some notes here to that effect.

The Court: You just know it was.

The Witness: Yes, sir.

The Court: All right.

Q. I will read to you a short excerpt from a document which will soon be offered in evidence, your Honor.

I will eventually offer this in evidence, your Honor, when the right time comes, but please—

The Court: You better mark it for identification, if you are going to be using it for any purpose.

Mr. Kalaidjian: If Mr. Davis intends to read it for indicating the amount of the reinsurance, I object to it (75) as totally irrelevant.

The Court: I will allow him to mark it for identification anyway.

(Plaintiffs' Exhibit 1 marked for identification.)

Q. I ask you to please read the third full paragraph on that page, page 2 of Exhibit 1-D for identification.

Mr. Kalaidjian: May I ask whether the paragraph you are requesting the witness to read relates to the amount of reinsurance?

Mr. Davis: It does.

Mr. Kalaidjian: I renew my objection.

The Court: I will let him read it. If it refreshes his recollection he may testify. If it doesn't refresh his recollection he may not.

A. What would you like me to do?

Q. Does the reading of that paragraph that I have just shown you refresh your recollection as to the amount of net liability retained by your company on Policy D.E. 3540, also known as Exhibit A here? A. It does.

Mr. Kalaidjian: Your Honor, I have an objection.
The Court: I will allow him to testify to it.

Q. After reading that and having your memory refreshed, what was the net retention of your company?
(76) A. $75,000.

Q. $75,000 part of five million dollars, is that correct? A. Yes, but that doesn't—if I can offer a statement—

Q. I would rather you don't, sir. A. I would like to explain that. I mean the fact that you say—

The Court: Go ahead and explain it.

A. The fact you say we keep only $75.000 is incorrect because the excess of loss reinsurance is merely like borrowing money, it has to be paid back over a period of time. The fact that one has $925.000 excess insurance doesn't mean you give it away or throw it down the drain. If you have a loss under this thing you pay it back over a period of years.

Q. What you are referring to— A. It merely reduces the loss at a particular time.

Q. What you are referring to, Mr. Blackman, is the fact that if you cause your excess of loss insurer some loss of a certain nature you would expect as an insurance executive to have the rate in subsequent years raised on you, isn't that what you mean? A. That's—
(77) Q. Is it or isn't it? A. These covers are self-adjusting, yes.

Q. You could, if you wished, leave that excess insure and go out looking for another one, couldn't you? A. Not very well.

Q. But it could be done? A. Everything is possible, yes.

Q. I just didn't want to argue that particular point, sir.

The Court: Don't argue the point.

Mr. Davis: I didn't mean to, your Honor. I just want to get it clarified for you on the record.

I will offer this Exhibit 1 for identification in evidence.

Mr. Kalaidjian: No objection.

The Court: It will be received.

(Plaintiffs' Exhibit 1 received in evidence.)

Mr. Kalaidjian: Except I don't waive my prior objection about reinsurance.

The Court: I understand.

Mr. Davis: Your Honor, I am not going to inquire on that exhibit so if your Honor wishes to read it—

The Court: Go ahead.

Mr. Davis: —it won't interfere with me at all.

(78) Q. I show you again, you have seen it before, Defendant's Exhibit C in evidence. In writing to Mr. Osborn, you asked him to return to you by T.W.X.—that's telex, isn't it— A. Yes, sir.

Q. His answer. A. Right.

Q. Do you have that answer? A. No, sir.

Mr. Davis: Does the defendant have the telex answer from Mr. Osborn to Mr. Blackman in response to Exhibit C?

Mr. Kalaidjian: I have never seen it.

The Witness: I can hazard the guess it was done by telephone, because I was talking to Chicago all the time.

Q. I just wanted to know to complete the record, sir. It's all right.

I assume that Mr. Osborn told you on the telephone to go ahead and write the risk. A. Yes, sir, I assume so.

Q. You recommended the risk, didn't you? A. Yes, sir.

Q. Would you please explain to me what you mean by you were Hollanderized on this fleet? (79) A. What's that?

Q. Did you say you were Hollanderized on the fleet? A. No.

Q. I didn't catch you. I didn't understand the remark.

The Court: Let's move on.

Q. Do you know whether your company paid the loss, or that portion of the loss for which it was liable on the Hull? A. No, sir, I don't know whether they did or didn't. I am sure it's a matter of record whether they did or didn't. I don't really know.

Q. If you had had any intimation of any defense on the excess liability policy, such as you, your company, interposed in this case would that not also have been a defense under your Hull policy?

The Court: He is not a lawyer.

Mr. Kalaidjian: I object.

The Court: I will sustain the objection to that.

Q. Were you aware of the same facts concerning overloading at the time you paid the Hull loss—

The Court: There is no evidence—

A. I say I don't know whether we paid it or not.

The Court: He says he doesn't know whether they (80) paid it or not. He had nothing to do with it, so he can't answer that question.

The Witness: I don't really know.

Mr. Davis: I am sorry, your Honor, I guess proof will be adduced here by us—

The Court: Anyway, he can't answer that question.

Q. Did you make any inquiries in the market as to whether or not the vessels listed in your excess liability

policy had ever been overloaded? A. No, sir, not to my knowledge.

Q. Did your loss people, your claims investigators, have access to the files and record of the Anne Quinn Corporation? A. I don't believe so. I don't know. I have no knowledge of it, sir, no.

Q. When a loss occurred that involved, let us say a cargo— A. Are you talking about the Hull loss now? If you are asking about the payment of the Hull loss we would normally pay if the Hull Syndicate paid. That would be the procedure.

Q. Even if you had a defense on the policy? A. In view of the minute policy I would have guessed we would just go along with whatever they did, yes, sir.

(81) Q. And you told us that approximately eighty percent of that Hull liability was in London? A. No, I didn't say that.

Q. I thought you said only nineteen percent was covered in the American Hull Syndicate? A. No, I would have to look at the notes. The notes are quite specific on it, if you will show them to me.

Mr. Kalaidjian: I think the record is American Manufacturers had three percent.

The Witness: A three percent line, yes, sir.

Q. But then you don't know where the remainder of the risk was? A. I believe the application shows it, yes, sir, the bumbershoot application shows it, if you will look at it.

Q. This one? A. No, in the application here. The application says the American Hull Syndicate had fifty-four percent, independent American companies had nineteen, and the balance, twenty-seven, was in London.

Q. The London people paid their loss, do you know that? A. I don't know that.

Q. You don't know anything about the payment of the (82) Hull loss at all? A. No, sir, I don't.

John Blackman, for Defendant, Cross

Q. Had you ever asked anybody who applied to you for marine and excess insurance like this bumbershoot policy here in evidence whether they had ever overloaded their vessels? A. No, sir.

Q. This was not important to you? A. No, I don't assume that at all.

The Court: I sustain the objection to that question.

Mr. Kalaidjian: I did not object, your Honor.

A. You are assuming—we assume they don't overload their vessels.

Q. Do you know what the requirements are generally in the trade about—in your trade about overloading of vessels? A. We don't make any inquiries about that. We assume that they don't overload their ships. I don't think any underwriter asks a broker of an assured whether he overloads his vessel.

Q. Did you ever ask that? A. Not to my knowledge, no. It would be a very strange question.

(83) Q. You didn't put that into your questionnaire, however. A. No, sir, it's not in the questionnaire.

Mr. Davis: I have no further questions.

Mr. Jablon: I have a few questions.

Examination by Mr. Jablon:

Q. Mr. Blackman, I would like you to refer to Defendant's Exhibit E, which I don't believe has been introduced into evidence, it's just been marked for identification. The second page of that exhibit I believe is a handwritten note, and I believe that is in your handwriting? A. No, that is not my handwriting.

Q. That is not your handwriting? A. No.

Q. Do you know in whose handwriting it is? A. I believe it is Mr. John Buglass.

John Blackman, for Defendant, Cross

Q. So then I take it Mr. Buglass was somebody else in the Kemper Group who did some work on the issuance of this particular policy? A. This is dated August of 1963.

Q. Right. A. Yes, sir. All I can do is tell you what it says.

(84) Q. What I am interested in finding out is, is Mr. Buglass, as far as you know, the man who negotiated the original bumbershoot policies for the Anne Quinn Corporation. A. I don't know, sir.

Q. You don't know? A. I have no recollection.

Q. So then I take it you don't know exactly what factors were taken into consideration in setting the initial premium at $7,500? A. I don't.

Mr. Jablon: I have no further questions.

Mr. Reid: May I ask a couple of questions, your Honor?

The Court: Yes, indeed, Mr. Reid.

Cross Examination by Mr. Reid:

Q. Mr. Blackman, turning to the Hull portion of this insurance policy, Exhibit A, I believe you stated that your company had a three percent interest? A. The notes so indicate, yes, sir.

Q. And did you negotiate that percentage? A. The negotiation as such was non-existent. The broker probably came and offered us that particular line.

Mr. Meshel: I object to that answer, your Honor.

(85) The Court: He doesn't know the answer to that question.

Q. And was any investigation made concerning the percentage which your company took? A. No, sir.

Q. How long have you been writing Hull insurance? A. Myself?

Q. Yes. A. About 25 years.

John Blackman, for Defendant, Cross

Q. I believe you stated on direct examination that when you took a large percentage of the Hull you made an investigation, am I right about that? A. That's probably an incorrect, a somewhat incorrect statement. Where we take leading position, if our company were asked to be the lead underwriter, to name the rate, to name the policy conditions, to investigate the risk, then we would go through that, yes, sir, but where the syndicate, American Hull Syndicate, had accepted a large line we were normally offered what we call a following line in the market.

Q. And what percentage would you say would be the percentage for a lead underwriter? A. In this market?

Q. Back in 1964. A. In London, in this market, where?

(86) Q. The American Hull Syndicate? A. The Hull Syndicate I think I previously stated took lines somewhere between 25 percent and 75 percent, which is what I would certainly consider a lead line.

Q. Do you know a gentleman by the name of C. Bradford Mitchell? A. No, I don't recall the name.

The Court: Well, take a five-minute recess, gentlemen. I plan to go on until about 1:15, and then adjourn to around 2:15.

(Recess.)

(In open court.)

The Court: You may proceed, Mr. Reid.

By Mr. Reid:

Q. How much Hull insurance was your company writing in the early 1960's, say from 1960 through 1964? A. A substantial volume. I don't know the exact amount.

Q. How much of that was taken as a part of the Hull Syndicate? A. Following the Hull Syndicate, the good majority of it.

Q. I beg your pardon? (87) A. A large majority of it was following the Hull Syndicate.

Q. You say that you didn't know a gentleman by the name of C. Bradford Mitchell? A. I don't recall the name.

Q. Would this refresh your recollection, that he is an author of an outline on American Marine Merchant Market? A. No, sir.

Q. Do you know a gentleman by the name of Robert R. Dwelly? A. Yes, sir, I have heard of him.

Q. He is the former vice-chairman of the American Hull Syndicate? A. Yes, sir, that's correct.

Q. Are you familiar with the book called, "Touching the Adventures and Perils, the American Hull Insurance Syndicate"? A. Yes, sir.

Q. Have you read that? A. I scanned it.

Q. I would like to read a portion of this to you, Mr. Blackman, and then I will ask you a question. I am referring to page 194, in the last paragraph on that page.

"The year's best-publicized marine disaster, (88) though it cost the syndicate only $446,151 was that which overtook the Victory-type American tramp ship, the Smith Voyager. En route from Houston to Indian ports, fully laden with grain, this vessel had stopped at Freeport in the Bahamas, following common shipping practice, to top off her oil bunkers for the long voyage ahead. Without question, (and not without precedent), she left Freeport overladen."

Are you familiar with the precedent referred to in this book? A. Which precedent?

Q. Of overloading. A. No.

Q. It had never come to your attention? A. I had no knowledge of overloading, no, sir.

Q. I am not only talking about the Smith Voyager, I am talking about other types of American ships? A. No, sir.

John Blackman, for Defendant, Cross

Q. Had you heard that Freeport was used as a bunkering port for vessels en route to foreign countries? A. Yes, sir.

Q. And did you ascertain the reasons why the vessels called at Freeport? A. Because they could buy their bunkers cheaper.

Mr. Kalaidjian: May we have a time reference?

(89) Mr. Reid: '63 and '64.

A. I assume they could buy their bunkers cheaper.

Q. Did you read the Journal of Commerce? A. Did I? Yes, sir.

Q. Did anything come to your attention from any newspaper or other memorandum or publication that was a common practice of American ships to evade the Coast Guard regulation against overloading by leaving an American port and then go to Freeport where the Coast Guard had no jurisdiction and there to overload fuel oil and water? A. What's the question, sir?

The Court: He said did you know that happened?

A. Did I know they overloaded, no, sir.

Q. Did that come to your attention in any way whatsoever? A. No, sir.

The Court: He is asking if you knew of any practice by which American flag vessels would go to Freeport and take over fuel and water which as a result they were overloaded when they left Freeport which was outside the jurisdiction of the U. S. Coast Guard in '63 and '64?

(90) A. No, sir, it was my impression they went to Freeport because they could buy their bunkers cheaper.

Q. I am going to continue reading from the book and ask another question.

"Five days later, in heavy mid-Atlantic weather, she was stopped by an engine breakdown, took a sharp, permanent list, and had to be abandoned, four lives being lost

in the course of rescue operations by a German freighter. Taken in tow for Bermuda, she foundered on December 27th. After some deliberation, the syndicate determined to pay the total loss, 'without condoning the overloading which seemed apparent in the case,' and with a stipulation, 'that consideration be given to an appropriate advise, presumably through marine brokers, of the syndicate's strong feelings regarding violations of safety regulations'. An ironic aspect of this casualty was that, at a Board of Managers Meeting two years earlier, it had been asserted, 'That there is apparently no specification in bunkering ports such as Freeport with respect to the draft of vessels taking on fuel and water,' and that, 'vessels, already deeply laden with cargo, on entering the bunkering port, were sailing below their marks.' It took the Smith Voyager to drive the point home."

Were you familiar with the Board of Managers Meetings and deliberations two years before? (91) A. No, I had nothing to do with them.

Q. Yet you said you took three percent risk on the Hull in this case? A. Yes, sir, that's correct.

Q. Did it come to your attention in 1963, '64, that there was apparently no specification of bunkering in ports such as Freeport? A. I was not cognizant of the fact, no, sir.

Mr. Reid: No further questions.

The Court: All right, Mr. Kalaidjian.

Re-direct Examination by Mr. Kalaidjian:

Q. I understood you to say in response to a question of Mr. Davis that it was your assumption that the vessels sought to be insured in vessel D.E. 3540 were not being overloaded? A. I am sorry?

Q. I understood you to respond to a question of Mr. Davis that it was an assumption of the writer of Policy

D.E. 3540 that the vessels insured were not operated overloaded? A. That's correct.

Q. Was that an assumption essential only to the amount of premium or to the fundamental decision whether to (92) write the insurance or not? A. The second part, the second statement.

Q. That is, the decision to write the policy itself? A. Yes.

Q. By that do you mean that you wouldn't write a policy knowingly on overloaded vessels at any rate? A. That's correct.

Mr. Meshel: Objection as to the form of the question.

The Court: I think he has answered that. In writing policies, you proceeded on the assumption that the vessels wouldn't be overloaded, is that correct?

The Witness: Yes, sir.

The Court: That goes to whether you would write the policy?

The Witness: It was fundamental to the acceptance of the risk, yes, sir.

Q. At the time you made the decision to write the policy were you in possession of any information suggesting that any of these vessels sought to be insured were or had been operated overloaded? A. No, sir.

Q. Did Mr. Osborn leave the company? (93) A. He has retired.

Q. What about Mr. Buglass, who was mentioned in your testimony? A. He is now employed by a broker in San Francisco.

Q. One final thing. There has been reference to a Hull Policy by which you had a three percent interest. Can you identify this batch of documents for me, please? A. This looks like part of a joint policy issued by the broker

to which we subscribed, which American Manufacturers subscribed to their share.

Q. Is that document basically the American Manufacturers undertaking with respect to Hull insurance on this fleet? A. Yes.

Q. And would you look at the first page and tell us the period of the coverage? A. 31 October '64 to 31 October '65.

Mr. Kalaidjian: I ask this be marked as an exhibit, your Honor.

The Court: Have you seen this exhibit, gentlemen?

Mr. Meshel: No, your Honor. It's a very important part of the case. I wonder if we could have a few seconds to look this over.

(Pause.)

(94) The Court: I think the witness has identified it and rather than wasting a lot of time, mark it for identification and then I can consider any objections after these gentlemen have had a chance to read it. There won't be any objection as to its authenticity, there will only be an objection as to the relevance of it.

(Defendant's Exhibit G marked for identification.)

Q. Mr. Blackman, does this page which I have opened the policy to, refer specifically to the Smith Voyager? A. Yes.

Q. And describes the assureds who have any interest in the Smith Voyager? A. Yes.

Q. And the loss payee? A. Yes.

Mr. Kalaidjian: I will ask this page be marked as Exhibit G-1.

(Defendant's Exhibit G-1 marked for identification.)

John Blackman, for Defendant, Re-cross.

Q. Mr. Blackman, did you testify that the premium for this bumbershoot was basically based on the number of vessels involved? A. That is the normal way of assessing the (95) premium on a bumbershoot policy.

Q. To what extent did these incidental non-marine coverages figure in the premium? A. They don't normally affect it unless there is something unusual there.

Mr. Kalaidjian: That is all.

The Court: Any other questions, gentlemen?

Mr. Meshel: Yes, your Honor.

Re-cross Examination by Mr. Meshel:

Q. Did you say in answer to Mr. Kalaidjian's question that you wouldn't have insured this outfit if you had known they overloaded their vessels? A. Yes.

Q. And that was because you were concerned about a specific statutory violation? A. That was because we were concerned with it as a matter of underwriting risk.

Q. Was it also because you were concerned about the violation of a specific piece of the statutory? A. I don't think so. I don't think that was part of our consideration.

Q. Did you exempt, did you agree to pay this risk even if there was a statutory violation? (96) A. Did we or would we?

Q. Did you agree to pay under this bumbershoot policy to the assured in the event that there was willful violation of a statute by your assured?

Mr. Kalaidjian: I object to the form of the question, and also it calls for the witness to give a legal conclusion.

The Court: I will sustain the objection. You can ask him is there any exception to the policy relating to statutory violations.

Mr. Meshel: All right.

Q. Would you tell us what you meant by the exclusion provision contained in Exhibit B?

Mr. Kalaidjian: Exhibit A is what you should be looking at. Exhibit A wasn't in effect at the time of the loss.

The Court: Please move along.

Mr. Meshel: The policy speaks for itself. I withdraw the question.

I take it there are no further questions, and you are excused, Mr. Blackman.

Mr. Reid: I would like to make an offer in evidence of the page I read to the witness. It was read from the book as I have described in the testimony, and it (97) shows that this book was copyrighted in 1970 by the American Hull Insurance Syndicate.

The Court: All right.

(Plaintiff Anne Quinn Exhibit 1 received in evidence.)

The Court: Mr. Kalaidjian.

Mr. Kalaidjian: I mentioned when Mr. Blackman took the stand that upon completing his testimony there were a couple of housekeeping matters I would like to attend to.

Hopefully, I would like to start my next witness, if possible, after lunch, in order to avoid an inconvenient break in the testimony.

The housekeeping matters relate to the pre-trial order. I had submitted to Mr. Meshel, who I understood was requested by the Court to prepare the pre-trial order, the portions of the pre-trial order which the defendant was responsible for, and one of the documents that I submitted, or my submission to Mr. Meshel had a paragraph that was designed to regularize the participation in this action of the claimants in the limitation of liability action

by giving them a court ordered status of plaintiff-intervenors, and I would like to move—when I mentioned this to Mr. Meshel, that he had not included it in the order, he (98) said, "Please sign the order anyway, I agree in principle to what you say and we can bring it up in Court."

I would like to move the Court to have the pre-trial order deemed amended to state this recital which was in what I gave to Mr. Meshel and read, "From the inception of this declaratory judgment action all of the claimants in the limitation of liability action entitled, Petition Earl J. Smith Company, *et al.*, docket #65 A. D. 55, have participated herein to the same extent as though they had been originally joined as parties for purposes of defining and clarifying their status in the action. It's ordered that each and all of the limitation action claims be and hereby are deemed joined in this action as third party interveners."

The Court: There is no objection to that.

Mr. Kalaidjian: The other item I had, I submitted to Mr. Meshel to be attached to the pre-trial order a rather lengthy index by title or description of the documents which my firm inspected and photocopied pursuant to a discover order that was entered in this action, and I don't believe that the index was submitted with the pre-trial order.

I would like to ask that the pre-trial order be amended deemed to list these documents, because these are (99) the documents referred to in Paragraph 4 of the pre-trial order.

Mr. Meshel: Your Honor—

Mr. Kalaidjian: Not the documents, but the list of documents referred to in Paragraph 4.

Mr. Meshel: Not to be overly technical, I would like to give the Court background. We have never

received any documents from Mr. Kalaidjian's office until about two days before the order was being drafted.

What happened was he had sent over a pre-trial order which was a complete pre-trial order, and I also had drawn up a pre-trial order. Unfortunately, in the transcription, my secretary in the rush to get this thing out, there was a confusion.

There was a two-part confusion. First, I sent your Honor an immediate explanatory letter on one of them as to the question of ocean marine and I asked to be relieved from that language, because our position has been and has always been, it's not a surprise tactic, this is a general excess policy and the jurisdiction is not on the basis of some sort of maritime contract but we claim it's an excess policy governed by general questions of fraud under New York Statute.

So I asked to be relieved of that section of it.

(100) Number two, Mr. Kalaidjian's associate, Mr. Maass, had only sent this last volume number document—I never saw it until two days before trial—

The Court: Gentlemen, I don't want to waste an awful lot of time on that. I won't receive it as amended to the pre-trial order, but I understand the background, and if he offers any of the documents in that list and there is an objection I will hear it at the time. That's the only way I can solve that one.

Mr. Kalaidjian: Lest I seem to have been dilatory in submitting to Mr. Meshel—

The Court: That doesn't bother me in the slightest. That's the only way I can handle it.

Mr. Kalaidjian: This matter he says he got two days before the order was submitted, was

submitted under a covering letter dated May 20, 1973, and I think the pre-trial order was submitted to the Court around June 20th.

The Court: All right.

Mr. Kalaidjian: Do you want me to call my next witness now?

The Court: Yes, I wish you would.

RICHARD SUEHRSTEDT, called as a witness on behalf of the Defendant, having first been duly sworn, testified as follows:

(101) *Direct Examination by Mr. Kalaidjian:*

Q. Mr. Suehrstedt, where do you live? A. Cleveland, Ohio.

Q. How old are you? A. Forty-four.

Q. What is your occupation? A. I am a naval architect and marine engineer.

Q. By whom are you employed? A. By Marine Consultants and Designers, Inc.

Q. What's the address of Marine Consultants and Designers, Inc.? A. 601 Rockwell Avenue, Cleveland, Ohio.

Q. What's the business of Marine Consultants and Designers, Inc.? A. We are consulting naval architects and marine engineers.

Q. Would you please state briefly your professional education? A. I graduated from the University of Michigan with a Bachelor of Science and Engineering Degree, Naval Architecture and Marine Engineering.

Q. What year? A. 1951.

(102) Q. What employments have you had since then? A. Since then I have been consistently employed by Marine Consultants and Designers.

Q. Are you licensed to practice engineering in any state? A. I am licensed in the State of Ohio.

Q. What sort of vessels have you—do you participate in the design of vessels? A. I am Chief Naval Architect and a Vice-President of the company and supervisor of all of the design work that is prepared in our office.

Q. Have you participated in the design of cargo vessels? A. We have participated in bulk cargo vessels, conversion of Liberty ships, conversions of Victory ships.

Q. At my request were you asked to conduct a study of the operations of certain of the vessels which are named in Exhibit A, Exhibit A being Policy D.E. 3540? A. Yes, we were.

Q. What specifically were you asked to cover in your study? A. We were asked to determine the amount of overloads that the vessels may have carried.

(103) Q. What source did you use of information in conducting this study? A. We used National Cargo Bureau Loading Certificates, we used fueling reports, we used telegrams, we used passage logs, engineer's logs, whatever document would have an indication.

Q. Where were these documents obtained from? A. From Thacher, Proffitt.

Mr. Jablon: Excuse me, your Honor, I would like to raise an objection at this point to the characterization of the documents which have allegedly been used in support of this statement.

The Court: Don't worry about characterization. There is no jury here.

Mr. Jablon: It's on the point that there has been no authentication of these documents.

The Court: All he is saying is what he looked at.

Mr. Kalaidjian: We will be getting to the specific documents, your Honor.

The Court: I am sure.

Q. Can you tell us the names of the vessels that were included in your study? A. We investigated the

Smith Caper,—may I refer to my own notes?
(104) Q. Yes.

The Court: Sure, go ahead.

A. Smith Caper, Smith Voyager, Smith Victory, Issac Mann, Janet Quinn, Russell L. Smith Adventurer, Smith Builder, Smith Conqueror, Smith Defender, Smith Exployer, Smith Pilot, Smith Tourist.

Q. What was the time span of the operations of these vessels that was covered in your study? A. From mid-1963 to mid-1965.

Q. Did you break that time span down into two periods? A. Yes, we did.

Q. What was the demarking date? A. Those voyages that commenced prior to August 13, 1964 and those voyages commenced after August 13, 1964.

Q. Would you describe, please, the method that you employed in conducting this study with the documents? A. We first determined what the dead weight of the vessel was. Then we determined what the cargo was. To this we determined and added what the fuel and fresh water was, if known, stores were added, the difference—

The Court: I am interested at what point in time would you do this, you would take the dead weight, cargo, fuel, fresh water. At what point of time?
(105) The Witness: This was taken at intervals along a voyage.
The Court: At different times?
The Witness: Yes.

The Court: All right.

Mr. Kalaidjian: Specifically my questioning will be directed to voyages from Gulf ports to Freeport, then to Ceuta, and then on to foreign ports, which was the voyage the Smith Voyager was on.

Q. From what source did you obtain the vessel's dead weight capacity? A. From the American Bureau of Shipping records.

Q. Does the American Bureau of Shipping perform some function with respect to the assignment of load lines of vessels? A. Yes, it does.

Q. What does it have to do with it? A. It administers on behalf of the U.S. Coast Guard the assignment of load lines to ships.

Q. And is that specifically provided in the federal regulations? A. Yes, it is.

Q. Would you define, please, what dead weight capacity is? (106) A. Dead weight capacity is the lifting capacity of a vessel or the long tons that a vessel can lift when loaded in salt water to its marks, summer marks.

Q. What items tonnage are included in the concept of dead weight capacity? A. Dead weight would include crew and effects, provisions and stores, permanent stores and fittings, cargo, fresh water and fuel.

Q. How did you determine in any given instance when a vessel, or whether, rather, a vessel was overloaded or not? A. If the cargo, fuel and fresh water and stores, when added together, totalled more than the dead weight, allowable dead weight, it was overloaded.

Q. Did you charge the vessel's dead weight with any tonnage for stores where there was no documentation furnished to you? A. No.

Q. Did you as part of your study examine the decision of the U.S. Court of Appeals for the second circuit in the limitation of liability action involving the Smith Voyager? A. I examined portions of it, yes.

Q. In that opinion was there a reference to the weight of stores on the Smith Voyager? A. Yes. They allowed 100 tons for crew and effects (107) and 135 tons for permanent fittings.

Q. In your opinion as a naval architect, are those allowances reasonable for Victory vessels bound on

voyages from the U.S. Gulf ports to foreign ports in India? A. I would say they were reasonable.

Q. But nonetheless you did not charge any vessel in your overloading study with such weights unless there was a specific document showing the stores on board? A. That's correct.

Q. Did you also use a tons per inch immersion factor in your study? A. Yes, we did. We used 52 tons per inch as a standard tons per inch immersion.

Q. What did you base the 52 tons per inch on? A. A typical Victory ship has a tons per inch of 51.5. The Liberty vessels have a tons per inch of 48.8 or 48.9. We used 52 as a conservative base.

Q. That is, 52 would give the vessel the benefit of the doubt? A. Yes, it would.

Q. How many voyages did you find in your study that there were records which pertained to those voyages?

Let me see if I can't rephrase that better.

In the records that you were supplied with, (108) how many voyages did those records pertain to? A. 77.

Q. And of those 77 voyages, how many were in the period preceding August 13, 1964? A. 51.

Q. There would be 26, then, in the period subsequent to August 13, 1964? A. Yes.

Q. Just by way of encapsulation of the material we will go into in detail, let's address ourselves up to the period August 13, 1964. Of the 51 voyages studied, on how many of these voyages, if any, did you find evidence of overloading? A. 44.

Q. On the 51 vayages, how many were there where you felt the documentation was insufficient to make a judgment? A. One.

Q. On the 51 voyages, how many did you find where the vessel was not loaded for the account of Anne Quinn Corporation or Earl J. Smith and Co.? A. There were five such voyages.

Richard Suehrstedt, for Defendant, Direct

Q. In the period up to August 13, 1964, on how many voyages were there records pertaining to ships which loaded at U.S. Gulf ports and proceeded to the Far East via Freeport (109) and Ceuta? A. 37.

Q. On how many of those 37 voyages did you find evidence of overloading? A. 36.

Q. What about the 37th one? A. That probably would have been overloaded.

Q. What was the basis of your qualification? A. We didn't have specific records to prove the point.

Q. Let's go to the period subsequent now to August 13, 1964.

Of those 26 voyages, on how many did you find documentation of overloading? A. 19.

Q. And of those 26 voyages, how many were there where the ship was not loaded for the account of Earl Smith Company? A. Just one.

Q. In this period subsequent to August 13, 1964, how many voyages did you study in which the vessel loaded at U.S. Gulf ports and proceeded to the Far East via Freeport and Ceuta? A. 19.

(110) Q. Did you find any evidence of overloading on any of those 19 voyages? A. On 17 of those voyages.

Mr. Kalaidjian: I have reached a point in my examination where I am about to go to a voyage by voyage analysis of the documents and I think it might be more orderly to start it after lunch though it's fifteen minutes before your Honor said you intended to break.

The Court: Why don't you start? I have a matter I have to attend to at two, so I would rather spend the few minutes now.

Q. Let us start with the period which leads up to August 13, 1964, and begin with the Smith Voyager, specifically Voyage 5.

Would you tell us what these documents are that I am handing you?

Mr. Reid: May we fix Voyage 5 with reference to the disaster?

The Court: I take it this is prior to the disaster.

Mr. Kalaidjian: I said we were dealing now with the period leading up to August 13th.

The Court: I think Mr. Reid would like to know the date of Voyage 5.

Mr. Kalaidjian: We will get to that.

* * *

(178) Mr. Kalaidjian: As a result of the colloquy between counsel and the Court off the record, we have arrived at this stipulation:

"It is stipulated that the overloading study prepared by Marine Consultants and Designers, Inc., Exhibit J for identification, based on the records of Earl J. Smith Co. and Anne Quinn Corporation shall be received in evidence without further testimony from Mr. Suehrstedt in substantiation of the data contained therein and without prejudice to plaintiffs' and interveners' right of cross examination of him."

The Court: I take it there is no objection to that stipulation, but Mr. Reid reserves the position he is not stipulating but he is not objecting. Is that correct?

Mr. Reid: Yes, all without prejudice, your Honor.

(179) Mr. Barish: And, your Honor, if I may, I think it's implicit in the stipulation that what we are basically agreeing to is that the material contained in the documents is what the witness would testify to and from. We are not agreeing necessarily to its accuracy.

The Court: No, no, it's without prejudice to anybody, I take it, putting on another expert or whatever they want to do as to that.

Mr. Kalaidjian: That is agreed.

* * *

(Defendant's Exhibit J received in evidence.)

* * *

(180) Q. Mr. Suehrstedt, are you familiar with the (181) principles which underlie the assignment of loadlines by the American Bureau of Shipping? A. Yes, I am.

Q. Have you participated in the design of ships in which it was required that the ship be assigned a loadline? A. Yes.

Q. Can you state without taking a gross amount of time, briefly, what these principles are? A. A loadline is established by the legal rules of the U.S. Coast Guard which roughly define the amount of reserve safety in a vessel due to its reserve buoyancy above the water line.

Q. Does the overloading of a Victory or a Liberty type ship have any effect on the reserve buoyancy of the ship? A. It reduces the reserve buoyancy.

Q. Does overloading of an ocean-going vessel effect its seaworthiness in any other way, or I should put it, can the overloading of a vessel effect its seaworthiness in any other way?

* * *

(182) The Court: I think so. This witness is a marine expert, I am satisfied with that. What does seaworthiness or unseaworthiness mean?

The Witness: Seaworthiness to me means the ability to withstand the perils of the sea through reserve buoyancy, proper enclosures on deck, ability to withstand rolling, ability to withstand a certain amount of the hazards of the sea.

The Court: And when the reserve buoyancy is reduced by overloading, what's the effect of that?

The Witness: It reduces the amount of seaworthiness.

* * *

(183) Q. In other words, the loadline, the legal loadline, is calculated to assure the vessel a margin of safety, is that what you are saying?

* * *

A. Yes.

* * *

(184) Q. And what's the effect on that margin of safety when the vessel is overloaded? A. It's reduced.

Q. How does this reduction affect the vessel's ability to meet stress situations at sea? A. That is reduced, also.

Q. Are there any other ways in which the overloading of an ocean-going vessel affects the risk of its operation? A. It's over—

Mr. Barish: I object to the form. I don't want to be overly technical, but I assume that Mr. Kalaidjian means risk from an engineering and steamship standpoint and not from a more technical standpoint which may be involved in this case.

Mr. Kalaidjian: I simply mean in common lay terms a more hazardous operation.

Mr. Barish: Fine. Thank you.

Mr. Kalaidjian: From the standpoint of an engineer, a Court, or a marine underwater, even.

Mr. Barish: I object to that, because there is no basis—that's the basis of my original objection.

The Court: I remember very well at the Smith Voyager trial one of the points you gentlemen brought out, (185) if a ship is below her marks and she develops a list for some reason or other,

the fact she is below her marks reduces the distance between the sea and the deck. Is that right?

The Witness: That's correct.

The Court: That is one of the things that you are talking about, I take it.

The Witness: Yes.

Q. One final point, Mr. Suehrstedt, in your examination of the Anne Quinn and Earl Smith documents, in connection with your study, did you find in virtually every file, freight bills from the vessel owner or the operator to the party for whom the grain was being carried? A. Yes, we did.

Q. Did you examine those bills? A. Yes.

Q. And did you ascertain from that examination on what basis freight was charged? A. Freight was charged on the basis of so many dollars per long ton of cargo carried.

* * *

(186) *Cross Examination by Mr. Barish:*

* * *

(190) Q. You do know that these Liberty ships have a safety factor built in them, don't you? (191) A. A safety factor in what way?

Q. Insofar as the handling of overloading of vessels. A. No vessel is supposed to be overloaded, it's to be loaded to its loadline.

Q. Yes, I know, we all— A. The loadline is determined.

The Court: Is there anything about the architecture of a Liberty ship that protects the ship against overloading, I take it to provide some kind of safety factor whether for better or worse she is overloaded?

A. To my knowledge, I know of no safety factor which applies to overloading.

* * *

(198) By Mr. Barish:

* * *

(211) Q. Was there a course indicated in most of these instances where you found overloading, a route? A. The route from the Gulf generally went via Freeport to the Mediterranean.

* * *

(212) Q. You indicated a discernible pattern going from Houston to Freeport, is that correct? A. I said from the Gulf ports to Freeport to the Mediterranean.

Q. And if I were to read you something would you say that this vessel followed that particular pattern, following the common shipping practice, to top off her oil bunkers for the long voyage ahead, without question, and not without precedent, she left Freeport overladen? Does that follow the usual pattern?

* * *

Mr. Barish: I am asking him whether the pattern (213) that I have just read to you, forgetting the term, "Usual," was the pattern that the Smith Voyager followed?

The Court: From the voyages that you testified about.

A. It generally is.

* * *

(214) Q. Can you give us—you said that certain of these vessels were overloaded by six inches, three inches, four inches. What's the figure that you would say, the amount of grain that a vessel should carry to be on her mark all the way and not even reduce her seaworthiness to any degree? A. I would have to know the season, where

it's going (215) to stop for fuel, where it's going to stop for water.

* * *

Q. Would you take the voyage that you indicated the vessel was six inches over, and you have all those computations. Tell us what the amount of grain she should have had on at that time as distinguished from the amount that she had on. A. If she had had 9,600 tons she probably wouldn't have been over.

* * *

Q. Let's take the Smith Voyager vessel on that particular route, stopping at Freeport and all the stops, but I want you to include in your figure, sir, if I may, a figure of 235 tons which might indicate crew stores of 135 tons for permanent stores and tell us how much cargo should be loaded upon her in order to keep her within her plimsoll mark. (216) A. 9,400 tons, roughly. Based on those numbers.

Q. 9,400 tons. Now, you have testified yesterday that for purposes of these computations Liberty ships, Victory ships, are all just about the same, correct? That was your testimony when the Judge asked you. A. Generally the same, sir, yes.

Q. With the same amount of freeboard? A. No.

Q. How much more freeboard on what type of vessel? A. Victory ship has 9 foot 7 inches of freeboard.

Q. And a Liberty? A. I gave you that number previously.

Q. 9.8. So a Liberty has more freeboard than a Victory? A. Yes.

Q. Okay.

* * *

(257) Mr. Kalaidjian:

* * *

Richard Suehrstedt, for Defendant, Cross

(258) The first, Exhibit AG, is the letters of instruction went forward from Mr. Fitzsimmon to the masters of certain of the vessels pertaining to instructions for voyages to India, and that is offered as an admission against the interest of the plaintiffs in that it contains statements as to the quantity of cargo they were instructed to load and statements with respect to the vessels being upon their marks upon arrival in India quite uniformly, which is the reason I offered the group.

* * *

(Defendant's Exhibit AG received in evidence.)

Mr. Kalaidjian: The next exhibit, your Honor, is AH, consisting of correspondence from masters of various of the vessels to Earl Smith Co., and AH is the one in which there appears the Coast Guard Citation. This is offered to show knowledge of the fact the vessels were overloaded and also the means by which various masters sought to get by the authorities who had responsibility for (259) enforcing the international conventions for overloading.

* * *

(261) (Defendant's Exhibit AH received in evidence.)

* * *

(263) (Seaman's Exhibit 1 received in evidence.)

* * *

Charles Diamond, for Plaintiff, Direct

(264) CHARLES DIAMOND, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Meshel:

Q. By whom are you presently employed? A. Dyson Shipping Co., Inc.

Q. Can you tell us what Dyson Shipping Co. does? A. Dyson Shipping Co. are shipping agents, forwarding brokers, cargo brokers.

Q. How long have you been employed by Dyson? A. Over 30 years.

Q. Can you tell us briefly your experience in the shipping business? A. I have had all the jobs from messenger through Vice-President, which I have been holding for the past eight or nine years.

Q. During the years 1962 through '64, did you personally have any connection whatsoever or did your company have any connection whatsoever with the shipment of bulk grains from Gulf Ports to ports in India? A. Yes, we have been the exclusive shipping agents for the Government of India since July 2nd of 1952, which included the period you mentioned.

(265) Q. In addition to the Earl J. Smith, and Quinn Co., did your company have any other dealings with other ship owners during that same time period? A. Yes, as the government of India had been shipping in that period in the nature of four or five or more millions of tons of grain from the U. S. to India, we handled a great many ships during that period.

Q. Can you define for us briefly what is meant by the term tramp operation? A. Tramp operation is one in which there is an *ad hoc* contract between a party wishing to ship goods and a party owning a vessel or controlling a vessel as between two or more points.

Q. How does it contrast with a liner operation? A. A liner operation is one which is scheduled on a regular

basis and proceeds between the indicated points of their commitment on a schedule rather than *ad hoc* basis.

Q. The shipments in 1961, 2, 3, and 4, were they mostly on a tramp basis or a liner basis? A. Mostly on a tramp basis.

Q. Did you at my request bring with you today certain books and records of Dyson Shipping Company's for the years 1962 through 1964? (266) A. I brought 1962 through August 1964.

Q. And are these books and records kept by you personally in the ordinary course of business? A. They are.

Q. Was it the regular course of business of Dyson Shipping to keep such books and records during 1962, 3 and 4? A. Yes, it was.

Q. Will you produce the documentation that you brought with you, please?

(Pause.)

Can you tell us briefly what these various pages represent? A. Essentially, these are maintained as a consolidated list of vessel status reports on a day to day basis facilitating our observations as to the progress or state of progress of the respective vessels in the various ports of the U. S.

Q. Do your records reflect the amounts of cargo listed by any particular vessel? A. Among the final entries on these records we invariably indicate the gross tonnage actually reported to have been loaded on board the vessels in accordance with the weight certificates issued by the U. S. Licensed (267) Weighing Inspectors.

Q. Is that in long tons? A. These are in long tons invariable, yes.

Mr. Meshel: I would like them marked for identification.

Perhaps, your Honor, if we took them year by year, these are broken down into years, these might be more helpful.

Charles Diamond, for Plaintiff, Direct

As Plaintiff India Exhibit 1 are items that bear the caption at the top of the page, Wheat, January 1963, February 1963; Wheat, March 1963; Wheat, April 1963; Wheat, May 1963; Wheat, June 1963; the same notations for July, August, September, October, November and December, all 1963.

(Plaintiff India Exhibit 1 marked for identification.)

Mr. Meshel: I would like to have marked as Plaintiff India 2 for identification another batch of documents for the year 1962.

(Plaintiff India Exhibit 2 marked for identification.)

Mr. Meshel: For the record, India 2 for identification are a number of sheets with the designation, Wheat, January 1962, each month having a separate sheet (268) through to December '62.

I would like to have marked as India 3 for identification the slips for the year 1964.

(Plaintiff India Exhibit 3 marked for identification.)

Mr. Meshel: India 3 for identification consists of the slips for January 1964, February 1964, March, April, May, June, July, and August, stopping at August 1964.

I would now offer into evidence the exhibits previously marked as India 1, 2 and 3 for identification.

Mr. Kalaidjian: What's the purpose of the offer?

Mr. Meshel: Your Honor, this goes to one of the hearts of our defense, and we hope to say, your Honor, in this regard, that the practice of overloading during the initial time that this policy was taken out, the time of renewal, was not only done but was practically done by every ship, was a notorious condition in the insurance community, in the shipping community.

The Court: I see what you are trying to drive at. I think I will leave them marked for identification at this point until we get some further testimony on that. I think the issue that I have to consider here is whether it was known to the defendant, but I will leave them (269) marked for identification.

Mr. Meshel: I want to underscore the position that they either knew or should have known. They can't stick their head in the sand.

I want to go over some specific examples with Mr. Diamond.

The Court: You can do that.

Mr. Meshel: I offer concomitant with Plaintiff India's 1, 2 and 3, the official publication of Lloyd's Registry of Ships for the years 1961-2, 1962-3, 1963-4.

The Court: What's the purpose?

Mr. Meshel: It lists the dead weight capacity of each vessel for the purpose of making comparable—

The Court: Is there difference in those from the dead weight certificates the defendant has produced?

Mr. Meshel: We would like to take those particular vessels which are either of the same dead weight of the vessels testified to by the defendant's expert witness and/or less than that, and compare that as against the cargos carried from Gulf ports.

The Court: Are these American vessels or are you bringing in other kinds?

Mr. Meshel: I believe they are mostly American, but there are some foreign.

(270) The Court: Victory and Liberty ships.

Mr. Meshel: Yes, definitely, of companies other than Smith vessels. The witness already testified that in his opinion a carriage of bulk cargo of anything more than 9,400 tons in his opinion was a hazardous situation. If that is so, and we can show your Honor 50 or 60 ships during the same period,

we think we show your Honor more than constructive knowledge.

The Court: All right.

Mr. Meshel: I offer Volume I of Lloyds' Registry of Shipping—

The Court: I hope I don't have to read the books.

Mr. Meshel: I hope to present to your Honor a graphic chart.

The Court: I think you can. Put the books in evidence and prepare your chart, and Mr. Kalaidjian can compare it to the books.

Mr. Meshel: May we have them deemed marked in evidence?

The Court: Yes.

(Plaintiff India Exhibit 4 deemed received in evidence.)

Q. Mr. Diamond, if you would, would you open your (271) charts to March of 1962. I would like to review sampling of the types of vessels leaving the U. S. Gulf. We won't exhaust them. We just want vessels of a dead weight-wise comparable to the Smith Voyager, that is 10, 720 long tons, approximately.

Under U. S. Gulf, what does that represent? A. I am not sure what you want me to say.

Q. I would like you to explain what your various columns mean. Under March of 1962 you have in the left-hand column, U. S. Gulf. What does that represent? A. The proposed loading area for the vessel.

Q. Steamer represents what? A. The name of the ship.

Q. The tonnage? A. The quantity for which the vessel has been chartered.

Q. I see, for example, under the vessel Mount Shasta, it has 9500-10. What does that represent? A. That means 10 percent more or less, at the vessel owner's operation [option].

Q. I take it the vessel could load either 10 percent more or 10 percent less than the 9500 contracted? A. That's correct.

Q. Under the column, Supplier, I see the word, (272) Continental. What does that represent? A. Continental Grain, the supplier of the goods.

Q. Under the column, Discharging? A. Those are the proposed ports of destination.

Q. Next I see Lay Days. A. That is self-explanatory, the dates in which the vessel is supposed to be present for loading.

Q. E.T.A. is the next column. A. Estimated time of arrival at the loading port for the vessel.

Q. Again I think it's self-explanatory, but Load Port? A. That is the port at which the vessel has been nominated for loading.

Q. Tender March 3rd? A. The next four columns are exact dates of record, the actual date on which the vessels have tendered for loading having been duly qualified in accordance with the respective charters.

Q. The Mount Shasta attended, I take it, on March 3rd? A. Yes.

Q. She started loading? A. March 3rd.

Q. And she sailed? (273) A. March 5th.

Q. And how much cargo was loaded in long tons? A. 10,098.214 long tons.

The Court: What's the dead weight for that vessel?

The Witness: For our purposes we don't show. These are operational figures.

> Mr. Meshel: Over the weekend I have purloined from the Lloyds Registry of Shipping the listed dead weight and the name of the vessel owner. That information is contained in the Lloyds' list. Summer dead weight is 10,503 long tons. It was vessel owned by Cargo and Tank Ship Management Corporation. I have done this, your Honor, with ap-

proximately 60 vessels for the period 1962 through 1964, and I will present to your Honor a photographic chart showing that in no case of a Liberty-Victory type vessel, in no case was there anything even coming close to this expert's figure of 9,400, and I will represent that to you in the chart.

The Court: Let me ask you, what kind of ship is the Mount Shasta, do you know?

The Witness: I don't know offhand.

Q. Let's take one other.

The Court: Do you know which of these vessels (274) on those lists are Victory or Liberty?

The Witness: Offhand, I wouldn't know.

Q. Let's go to December of 1962.

The Court: We are not going to go through these sixty.

Mr. Meshel: No. Your Honor asked about a Liberty or Victory vessel and I want to give a graphic example.

Q. Do you see the Portland Victory on December of 1962, Mr. Diamond? A. Yes, I do.

Q. To your knowledge, is that a Victory Vessel? A. Well, I would assume. I really don't know. I assume it's a Victory.

Mr. Meshel: Lloyd shows a summer dead weight of 10,714. Again, I think anything further would be an academic exercise, your Honor, and I hope to renew my offer on Mr. Diamond's records.

The Court: What was the cargo?

Q. What was the cargo, Mr. Diamond? A. 9,600 long tons actually loaded, sir.

Q. Would you look at January 1964, for the Portland Victory. Tell us how much that vessel loaded. A. 10,000 long tons, even.

(275) Mr. Meshel: The dead weight of that vessel, your Honor, is 10,818.

The Court: I thought that was the Portland Victory you told me was 10,714 a minute ago.

Q. Let's take the one immediately above for January 1964, Mr. Diamond, the Taddei Victory.

Mr. Kalaidjian: Before we do that, could we have reference to Lloyds Registry and get the dead weight of the Portland Victory.

Mr. Meshel: I may have an error in my notes.

The Court: Let's straighten it out.

Mr. Barish: In this regard, your Honor, I would like to point out we may be able to cut things short. Mr. Kalaidjian's expert stated for these purposes, Victory ships or Liberty ships are all about the same, so there is no sense worrying about dead weight, I guess we are better off worrying if it's Liberty or Victory and getting it into the category.

The Court: No, I want to get the correct weight because Mr. Meshel gave two different figures.

Mr. Kalaidjian: Reading from the 1964 Lloyds Registry of Shipping, it shows the summer dead weight of the Portland Victory at 10,818 long tons.

Mr. Meshel: Would you also look up the Taddei (276) Victory, please, Mr. Kalaidjian?

Mr. Kalaidjian: 10,717 summer weight.

Q. How much did that vessel load? A. 10,000 long tons even.

Mr. Meshel: Again, I hope to show this in a graphic form.

The Court: All right.

Mr. Meshel: That's all the questions I have.

Mr. Barish: Mr. Diamond, I have just one short question to follow up.

Charles Diamond, for Plaintiff, Cross

Examination by Mr. Barish:

Q. There is a service available to the maritime industry by the name of the Maritime Research Service? A. Yes.

Q. Does that service carry this tonnage on a daily basis or weekly basis? A. They are a weekly publication which reports the charters fixed as of Friday of each week.

Q. Does that carry the tonnage that you have indicated? A. They carry—the element of information of tonnage in that publication is the contracted quantity vessel-wise.

Q. And that is reported to the industry generally? A. That is reported to the industry with other (277) elements of information in connection with such charters, yes.

The Court: Any other questions?
Mr. Barish: One other thing.

Q. Is there any other publication that carries this type of tonnage used in the industry? A. The Journal of Commerce usually does.

Mr. Barish: Thank you.
The Court: Any other questions?
Mr. Barish: I have none.
The Court: Go ahead, Mr. Kalaidjian.

Cross Examination by Mr. Kalaidjian:

Q. Mr. Diamond, what did you say Dyson's relation is to the India supply mission? A. We are the agents for the Government of India supply mission at all ports in the U.S. and Canada in respect of supportation made from these countries where the support is undertaken by the Government of India.

Q. Did you do the chartering for the Government of India? A. We are one of a number of cargo brokers who work for the Government of India. We do some chartering.

Q. What's your own background in the shipping (278) industry? A. My own background?

Q. Yes. A. Well, I have worked for Dyson Shipping for over 30 years, I have handled support—I have been to almost every port in the U.S., most of the grain elevators, and other facilities for shipment from the U.S., and I have worked in the Gulf for four and a half years for Dyson as manager, I have generally supervised supportations of a wide variety of commodities to all parts of the world, and recently particularly to India. The India supply mission is a part of the Government of India.

The Court: How does it work out with you and the India supply mission? Do you get instructions as to how much grain India would like to have in a given period of time, and you find the ships?

The Witness: It works like this: The India government contracts to purchase grain and contracts for vessels, sometimes concurrently, sometimes independently of the other.

The Court: They get their vessels through you?

The Witness: Some of them through us. They do it through public tender inquiries, through a panel of brokers of which we are one. The India supply (279) mission as principal, actually effects the charters. Thereafter, immediately on undertaking contracts for grain and vessels, they notify us, sometimes by phone and confirm always by telex, that they have entered these particular contracts, and thereafter we work to coordinate with the suppliers and with the vessels' agents, their owners, whoever it may be designated, the vessel and the cargo, and we at each of the loading ports accept the

tender through our sub-agents, the actual physical tender of the vessel is made in writing to us with documentary evidence of the vessel's suitability to load the cargo as required by the charter and by law and regulation.

The Court: When you are told by the Indian Government or supply mission that they made a deal for such and such a vessel to load grain at New Orleans, would they tell you how much grain is to be loaded?

The Witness: They tell us the contracted quantity, 10,000 tons, ten percent of five percent more or less. This tolerance is an operational facility of the vessel, and the master or his delegate, or the owner and his delegate, determines the precise quantity based on numerous factors which that vessel is in fact prepared to load.

Thereafter, they declare the quantities, and (280) we relate it to the suppliers of the goods, and they ready that amount of goods, and they proceed to load thereafter.

Q. Let's assume that a charter is entered into between the Government of India and a vessel owner and that Dyson has been assigned by the Indian Government to handle this shipment. What are the factors which determine the quantity that the vessel may load? A. The master declares the quantity. The master either directly or through the owners would declare the quantity, mostly in writing, sometimes by radio, sometimes the Captain comes in and he may change it four or five times while he is in port. But generally the agents or the master would declare the quantity.

Q. At Dyson do you have a library in which you have copies of the Lloyd Registry of Shipping and the American Bureau of Shipping Records? A. We don't, no.

Q. Do you find generally in the charter or in the shipping documents a statement of the vessel's dead weight tonnage? A. There is a space for it, and it's there sometimes and sometimes it isn't inserted.

Charles Diamond, for Plaintiff, Re-direct

Q. When it's not there, does Dyson ask the vessel owner to provide the information? (281) A. No, we don't.

Q. Is Dyson, as the agent of the Indian Government not interested in knowing the dead weight capacity of the vessel?

Mr. Meshel: I object to this line of questioning for two reasons. First of all, the question is improper, second of all, whatever fault they are trying to attribute at this point, it's after the limitation proceeding. This is only the question of the insurance company's constructive knowledge, not Dyson's.

The Court: I will sustain the objection to that one.

Q. Don't these exhibits, 1, 2 and 3, show the ports at which the vessels named in the exhibits were expected to call between their loading ports and their discharging ports? A. No, sir.

Q. So that you wouldn't be concerned at Dyson about knowing where they are going to stop en route? A. That's correct.

Q. So you don't know whether any of the vessels named in Exhibits 1, 2 and 3 ever called at Freeport or Ceuta, or what route they took to get to their discharging point. (282) A. We would have no direct knowledge whatsoever.

Mr. Kalaidjian: No further questions.

Re-direct Examination by Mr. Meshel:

Q. Would you know whether or not they left the Gulf, U.S. Gulf? A. We are given a sailing advice to the effect the vessel has sailed and giving the estimated arrival date at India, so from our own experience, knowing approximately the time for the voyage, we would as-

sume that if they say they have sailed that they have sailed.

Re-cross Examination by Mr. Kalaidjian:

Q. Are you familiar with the rate of fuel and water consumption on Victory ships? A. No, I am not.

Mr. Kalaidjian: That's all.

Re-direct Examination by Mr. Barish:

Q. Are you familiar as to whether it would require the same amount of fuel to get from Houston directly to India or—

The Court: I don't think he knows. He has indicated he hasn't any knowledge.

(283) Mr. Barish: All right.

Mr. Meshel: No further questions.

The Court: You are excused, Mr. Diamond.

(Witness excused.)

(Recess.)

ROBERT DWELLY, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Meshel:

Q. Mr. Dwelly, were you subpoenaed by my office in the last couple of days to come here to testify? A. I was.

Q. Are you presently employed, sir? A. No, I am retired.

Q. How long have you been retired? A. Eight years the end of September.

Q. Before your retirement what did you do, sir? A. I was a marine underwriter with the Insurance Company of North America for some 37 years.

Q. Prior to being with the Insurance Company of North American were you with any other insurance firms? A. I was with the Maritime Insurance Company in (284) Liverpool, England.

Q. Were you a representative of the Insurance Company of North America at any time during 1962, '63, '64, with regard to the syndicated Hull insurance? A. I was the representative of the Insurance Company of North America as Board Manager of the Board of Directors of the American Hull Insurance Syndicate.

Q. What's the American Hull Insurance Syndicate? A. That is an aggregation of some, today I think it's about fifty companies, at one time it was roughly, before they had mergers, roughly seventy-odd companies formed originally in 1920 with the influence of the government, the government wanting to strengthen the marine insurance market and cooperating with the underwriters and the companies to form the American Hull Insurance Syndicate.

Q. In 1962 can you give us an approximation of how many separate insurance companies were members of this syndicate? A. Well, I would guess, and it would have to be a guess, around 70, 65 to 75, in that area, would be my guess.

Q. To your knowledge, was Kemper or American Manufacturers Mutual a member of that syndicate in 1962? (285) A. No.

Q. To your knowledge, did they ever work at all with the syndicate in writing Hull insurance in 1962?

Mr. Kalaidjian: Objection. The question is vague. What does he mean by work at all?

The Court: Maybe he can answer. Do you know if they had anything to do with Hull insurance at the time?

Mr. Kalaidjian: That wasn't the question asked.

The Court: I think it was. Did they?

The Witness: They were writing Hull insurance business, yes.

The Court: But not with the syndicate.

The Witness: Right.

Q. Do you know whether or not they were the co-insurers of the Smith Voyager in 1964 for Hull Insurance? A. I did not know then that they were, but I have learned since that they had an interest. Perhaps it would—

Mr. Meshel: May we have these two documents marked as India Exhibit 5 for identification and 6 for identification?

(Plaintiff India Exhibits 5 and 6 marked for identification.)

Mr. Meshel: Your Honor, I have subpoenaed the (286) American Hull Insurance Syndicate's records and their attorneys made a representation that they would produce the secretary, if necessary, to introduce these documents. I hope it will be unnecessary. Mr. Kalaidjian has already received a copy of these minutes, I believe a couple of days ago, and I would offer them in evidence as India Exhibits 5 and 6.

Mr. Kalaidjian: There is no objection on the basis of authenticity, your Honor, but the earlier of the two documents, which is the minutes of a 1962 meeting of the Board of Managers relates to a time when my client was not a member of the syndicate, and, therefore, it seems to me that India Exhibit 5 for identification is not shown to be relevant. I have no objection to India Exhibit 6.

The Court: Let's receive Exhibit 6.

(India Exhibit 6 received in evidence.)

The Court: What about Exhibit 5?

Mr. Barish: If I may be heard on Exhibit 5, your Honor, the basis of this offer, as well as the business of its hoped for admissibility is the law which I would like to read a short paragraph out of Couch on insurance dealing with this problem.

The Court: Never mind that. Tell me why you think it's relevant.

(287) Mr. Barish: The law on this area states an underwriter of a marine risk is presumed to be acquainted with the general course of incidents of the trade and he has the obligation to be knowledgeable. Generally established and notorious usages are presumed to be known to the underwriter and need not be disclosed.

The Court: You are talking about Couch. He says this is 1962, before any of the events here. I don't know if that is relevant.

Mr. Barish: The point is, and this is the posture of the case, the contract of insurance upon which this claim is based is a 1964 contract of insurance. The defense is that prior to 1964 the Smith Company was engaged in a systematic course of overloading, and did not disclose it, and that this is the basis for the disclaimer.

Under the law, if a course of conduct is existent at the time the contract is entered into it need not be disclosed if the insurance company either knew or—

The Court: I see, you are claiming this Exhibit 5 relates to that.

Mr. Barish: Yes, as of 1962 it was known by practically—well, I won't characterize it, by almost every insurance company—

The Court: Don't get into involved statements.

(288) Mr. Barish: I won't get effusive. It was known by a good number of insurance companies.

The Court: I will receive Exhibit 5.

(Plaintiff India Exhibit 5 received in evidence.)

Q. I want to ask you a few questions, Mr. Dwelly. Can you tell us, first of all, what these documents, 5 and 6, are? A. These are the formal minutes of the meeting of the Board of Managers held on the day mentioned here. One is November 15, 1962. The other is April 15, 1965.

Q. So there is no confusion, let's take the earlier one first. I believe that is Exhibit 5.

Now, when was that meeting held, once again? A. This was held on Thursday, November 15, 1962.

Q. Can you tell us were you present at that meeting, you personally? A. Yes, I was.

Q. Whom did you represent at that meeting? A. The Insurance Company of North America.

Q. Were there other insurance ocean-marine carriers at that meeting? A. Yes. They are listed here.

Q. Would you list them for me, please? A. The Aetna Casualty and Surety Company, (289) the Atlantic Mutual Insurance Company, Bankers and Shippers Insurance Company, Boston Insurance Company, Commercial Union Assurance Company, Continental Insurance Company, Eagle Star Insurance Company, Federal Insurance Company, Firemen's Fund Insurance Company, Grant American Insurance Company, Hartford Fire Insurance Company, the Home Insurance Company, Insurance Company of North America, Providence-Washington Insurance Company, Marine Insurance Corporation of New York, Royal Insurance Company, St. Paul Fire and Marine Insurance Company, Standard Marine Insurance Company, The Union Marine and General Insurance Company, Westchester Fire Insurance Company.

Q. As an underwriter in 1962, Mr. Dwelly, were you concerned with notorious conditions in the maritime—

The Court: With what?

Q. —concerned with conditions in the maritime industry which might affect your company's risk? A. Well, any good underwriter has to be concerned with that.

Q. Did your company, or did your association of companies, or did the syndicate, have any technical people that assisted you in ascertaining what if any risks you should be concerned about? A. Well, they were not directly—yes, we had (290) technical people operating in various ports, but they would only give—we would call upon them for information in the way of surveying vessels or seaworthiness, and that sort of business.

Q. Back in 1962, at this meeting of the syndicate, was there any specific discussion of the question of vessels using the Caribbean ports for bunkering and overloading vessels? A. Well, the minutes would indicate.

Q. Would you read Item #5 into the record, please? I am sorry, page 5, the item entitled Carribbean? A. "*Re*: Caribbean bunkering ports. One member commented that there is apparently no specification in bunkering ports such as Freeport in the Bahamas with respect to the draft of vessels after taking on fuel and water. Accordingly, it's believed that a number of vessels already deeply laden with cargo on entering the bunkering port were sailing below their marks. It was suggested that accidents following calls at Caribbean bunkering ports should be investigated carefully to determine whether such vessels were in overloaded condition before departure. The Chairman stated that the Claims Manager would attend to this."

Q. I take it that this concern was related not only to Hull insurance but to P and I insurance? (291) A. I cannot say. The syndicate had nothing to do with P and I insurance.

Q. What about Hull insurance? A. Hull insurance, yes.

Q. What was done physically after the meeting was held, the syndicate meetings? Were the minutes distributed? A. Well, it's the practice of the syndicate to

send to each company on the board a copy of the minutes, and those minutes are then kept in the respective offices of the board members and presumably are read by the assistant to the manager that is on the board.

Q. Directing your attention to Exhibit #6, can you tell us what the date of that meeting was? A. The date of that meeting was Thursday, April 15, 1965.

Q. Were you present personally at that meeting as well? A. Yes, according to the minutes.

Q. And would you direct your attention to that portion of the minutes which is referrable to the Smith Voyager? I believe that is on the last page, is it not? A. Yes.

Q. Can you tell us whether or not the Hull insurance on the Smith Voyager was paid by the syndicate and its (292) co-insurers? A. I can speak for the syndicate. What do you mean by co-insurers?

Q. Did the syndicate pay the Hull insurance? A. Yes.

Q. And to your knowledge did any of the other carriers who were co-insuring the Smith vessels' Hull, did they in any way disclaim, to your knowledge, on the Hull? A. Not to my knowledge.

Q. Are you the co-author of a book entitled "Touching the Adventures and Perils." A. Yes.

Q. And you made reference, I take it, to this particular catastrophe on page 194 and 195 of your book? A. Yes.

Mr. Meshel: I believe that has previously been introduced in evidence.

The Court: I don't know that it was in evidence. Mr. Reid showed it to me.

Mr. Meshel: I would offer it in evidence at this point, even though Mr. Reid has read to it. I offer it as India Exhibit 7, the particular page referred to.

The Court: I don't think I need that, as it's been read in.

Robert Dwelly, for Plaintiff, Cross

(293) *Cross Examination by Mr. Kalaidjian:*

Q. In 1964 what was the business of the American Hull Insurance Syndicate? A. The insurance of ocean-going vessels, Hull insurance.

Q. Hull insurance only? A. Yes, as far as I know. I said that they did not write P & I but, as you probably know, there are certain policies that include a P & I clause.

Q. But the syndicate, that is the Hull Syndicate, was not what would be called a multi-line company, was it? A. No.

Q. That is, they did not insure fire or automobile or that kind of thing? A. No, they only insured fire as related to vessels.

Q. As related to vessels? A. Yes.

Q. So their basic business was Hull insurance? A. Correct.

Q. Were you familiar with the Kemper Group of companies in 1964? A. I knew such a company existed.

Q Did you know the Kemper companies as multi (294) line companies, that is, that insured risks in other areas as well as the marine business? A. Yes.

Q. And by that I mean you knew the Kemper people to be in the automobile business, for instance, and other lines not related to marine? A. Yes.

Q. Did you attend the meeting of April 1965 of the Board of Managers? A. Yes.

Q. Was anyone from the American Manufacturers Mutual Insurance Company at that meeting? A. Not that I see. They weren't in the syndicate, and unless they were invited as a guest they weren't there. The minutes don't seem to show it.

Q. Generally, do the minutes show if guests are invited? A. Yes, they show everybody present.

Q. At that meeting, April 1965, did the managers receive a report from the Loss Committee about the Smith Voyager? A. Yes.

Q. Do you recall the substance of that report independently of the exhibit which you have in your hand? (295) A. No, I am afraid I don't. It's a long time ago.

Q. Would you take a moment to read the reference to the report from the minutes to see if it refreshes your recollection?

(Pause.)

A. I have read it.

The Court: Having read it, does that refresh your recollection as to what happened at the meeting about the Smith Voyager?

The Witness: Not to any great extent.

Q. The report attached to the minutes dealing with the Smith Voyager states that the management committee authorized the payment as being, "Consistent with good business judgment."

Did you see that? A. Yes.

Q. Do you recall what the business considerations were? A. Yes, I can I think give you maybe a little extension but basically the American Hull Insurance Syndicate is always in competition with the London market and with so-called outside underwriters, and anybody, of course, denying to pay a claim under a policy, any underwriter, always has in mind, I suppose, the effect on his business. (296) Q. That might result in— A. So this was—

Q. —a reduction of further business? A. Yes. So this was a business decision.

Q. When you are in the business of writing basically Hull insurance you are more sensitive to that than if you are in a multi-line insurance.

Mr. Barish: I object to that.

The Court: You had the alternative to refuse payment. Why would you have refused payment on the Smith Voyager, if you had?

The Witness: Well, we believed it was overloaded.

The Court: You believed it was overloaded, all right, so one alternative was to refuse payment. But you felt that that would be a poor thing to do business wise, in view of the competition with the London market, did I understand you correctly?

The Witness: That's correct, your Honor.

The Court: It might hurt your business in the future if you had stood on the overloading of the Smith Voyager and refused to pay on the Hull insurance policy. You felt that would have hurt your business, people would have gone to London instead, is that right?

(297) The Witness: That's correct, your Honor, yes.

Q. Reference has been made, Mr. Dwelly, to your participation as a co-author of a book called, "Touching Adventures and Perils." Have you also written elsewhere on the subject of marine insurance? A. Yes. I can't remember the publication, but I wrote a chapter on good faith.

Q. You wrote that in a book entitled, "Property and Liability Insurance Handbook," did you? A. Yes.

Q. Published by Richard D. Irwin, Inc., in the year 1965. A. If it says so, I guess so, I wouldn't remember.

Q. Let me show you the book. A. I remember the book, but I don't know when it was published or who published it.

(Pause.)

A. Yes, this is the book.

Mr. Kalaidjian: Perhaps this book should be marked for identification.

(Defendant's Exhibit AQ marked for identification.)

Robert Dwelly, for Plaintiff, Cross

Q. Are you the author of the article which commences at Chapter 18 on page 252 and is entitled, "Concepts Associated (298) with Marine Insurance," Mr. Dwelly? A. Yes, sir.

Q. Did you say there, "Good faith is basic to all commercial contracts but in no other field has the doctrine of 'Uberrimae Fidei' attained the degree of importance it has in marine insurance"?

Were you the author of that? A. Yes, I was.

Q. On page 253 of this book did you write, and I quote, "Not only is the insured bound to disclose every material fact known to him, he is also charged with the obligation of disclosing all material facts which in the course of his business ought to be known by him."

Did you write that? A. Yes.

Q. Again at page 253, did you write this, and I quote, "If through ignorance or neglect he does not know any material fact he will be assumed to have known it, and its non-disclosure will render the contract voidable."

You wrote that? A. I did.

Q. What are some of the conditions which you as an experienced marine underwriter would consider material to the risk of insuring a fleet of vessels? (299) A. Well, we would want to know, to go to the basics, assuming this is a brand new risk we have never known of before, we would want to know something about the ownership—

The Court: I think that is an awful broad question.

Mr. Kalaidjian: Yes, I think I should come—

The Court: Supposing you were called upon to insure the hulls of a group of ships that you were told were going to be in the tramp trade from the Gulf ports to India carrying grain for the Indian government. What would you want to know?

A. I would want to know something of their previous record, assuming they are a fleet that's been in existence for a period of time.

The Court: Yes, assuming Victory and Liberty ships.

Mr. Barish: I don't want to appear rude, but there is an objection I want to get on the record and that is Mr. Blackman misstated in his testimony as it's been recorded that when asked this particular question he said he really didn't care, he just wanted to know the number of ships, so in that regard Kemper's knowledge is—

The Court: I don't think that enters this.

(300) Mr. Barish: I want to state my objection.

The Court: I am interested in what you would do.

The Witness: I will have to begin at the beginning. Assuming we had not had this risk before, of this fleet, we would look up Lloyds Register, look at the ages, want to know the previous premium and loss experience, we would want to know where it traded, where the vessels traded, types of cargo carried, we would have our surveyors inspect the vessels, probably, or take a cross-section of the vessels for upkeep and we would also—every underwriter doesn't do what I would do or would have done in the situation.

We would want to know the ports where these vessels trade to give us an appreciation of their estimate of the handling of the vessels and management. When I was in business I always told my surveyors that they were the eyes, the ears and the nose, they had to see, they had to smell, and they had to listen.

It's difficult, perhaps, to explain in detail, but you get the feeling of a risk, it's a fingertip thing. Every underwriter doesn't go to all that trouble.

Q. Let me carry this a step farther. There is some evidence in this case that at the time that the policy in controversy here was sought to be obtained, the operators (301) of the vessel, the prospective insured, were operating these vessels in overloaded, over their legal

drafts. Would you consider that, as a marine underwriter, material to the risk? A. Yes, I would.

Mr. Kalaidjian: That's all.

The Court: Why do you say that, sir?

The Witness: Well, because we have a classification society that classify these vessels, and they are assigned load marks which has to do with the quantity of cargo they can carry fully laden at various seasons of the year. A vessel cannot carry as much cargo according to the loadline in winter time as it can in summer time. That is a rough weather explanation.

Examination by Mr. Kalaidjian:

Q. What are the criteria that determine that? In other words, what's the policy of the assignment of these loadlines? A. You see, senility is taking its toll, my memory isn't as good. For instance, I know in England the Board of Trade assigned a loadline, marks to the vessels under the British flag. Under the American flag, I guess it's a department of government.

Q. That isn't what I meant. Are there considerations of safety which enter into the assignment of loadlines? (302) A. Yes.

Q. The safety of the vessel at sea? A. Yes.

Q. And the safety of the cargo and her lives? A. Yes, that's been the case since the late 19th century.

Q. And that's why you would consider overloading as a fact material to the risk if a vessel were being overloaded and were seeking to be insured? A. Yes, I would.

The Court: You say there is a risk. I am just a landlubber and I don't know but supposing a vessel is down on its marks six inches or so. What difference does that make?

The Witness: Well, if it's down six inches one voyage it may be down eight, ten inches the next voyage. I think

it's a question of management, and, of course, I am not a sailor, I am a landlubber, too.

The Court: As an insurance man it would worry you?

The Witness: It would worry me, yes. Very definitely. And, of course, there is always, I think, this angle, that I think it has to be proved perhaps in denying a loss that the overloading was the cause of the loss or (303) contributed greatly to the loss, if you are going to make a defense.

The Court: In other words, if an overloaded vessel went down because there was a plate which was defective in the hull you wouldn't resist that on the ground it was overloaded but you would say the overloading wasn't the direct cause of the loss, is that correct?

The Witness: I think some of our lawyers would try to help us reach that conclusion.

Mr. Kalaidjian: No further questions, your Honor.

Mr. Barish: I have just a few, your Honor, if I may.

Re-direct Examination by Mr. Barish:

Q. Sir, would you say that an underwriter is charged, a good underwriter, let's say, is charged to make himself knowledgeable on what's going on in the industry? A. Definitely.

Q. And if there is something that is material, that he considers material to his risk, wouldn't you say that he has an obligation to ask that question in his questionnaries? A. That obligation comes from within himself. A good underwriter, yes, he will ask a lot of questions. (304) Sometimes to the extent that brokers will not come back too often because they can find others that don't ask the questions, it's easier to place risks.

Q. Mr. Kalaidjian read to you from this book, "Property and Liability Insurance Handbook," and read to you

from your particular section or contribution to that handbook. I read you a sentence and ask you whether this also is not what you said and is not accurate.

"In the absence of the necessary degree of inquisitiveness on the part of the insurer he will be deemed to have waived the information insofar as that particular material fact is concerned."

Isn't that what you said? A. That is so.

Q. And that is accurate? A. Yes. It's my opinion, I mean. That's my opinion.

Q. Yes.

Now,— A. I think you will find there are cases decided on it.

Q. In what way? A. Yes.

Q. Did you not also say, sir, the first sentence on page 254, speaking now of the obligations of the insurer (305) as distinguished from the assured, "As to the insurer, he is charged with knowing matters of general knowledge and being well-informed about trade usages and customs, routes, port conditions, as to handling, packing, the peculiarity of particular cargo, and in the absence of the necessary degree of inquisitiveness," to use your language in this particular line, "—he is deemed to be waived the necessity for that information." Isn't that accurate? A. That is my judgment.

The Court: Did you along that line, when you decided for business reasons that you were going to pay the claim on the Smith Voyager, your company was involved in that risk as well as the syndicate, is that right?

The Witness: Yes, sir.

The Court: Had you been inquisitive about the Smith Voyager before?

The Witness: Well, you see, there again in this particular article that is being quoted I was speaking as an underwriter. Here I represented a company on the Board of Managers of a syndicate. The underwriting was

done by the syndicate manager, not by the company representatives.

The Court: So that it wouldn't in that case be you, it would be the syndicate manager?

The Witness: I wouldn't deal with the broker at (306) all, it was the manager of the syndicate who would deal with the broker.

Mr. Barish: I have nothing further.

Re-cross Examination by Mr. Kalaidjian:

Q. Is it your opinion that an underwriter's lack of the necessary degree of inquisitiveness would cast upon him the risk of facts, the concealment of which would be fraudulent?

Mr. Meshel: I object to the form of the question.

The Court: I will sustain the objection to the form of the question.

The Witness: I don't quite understand it.

The Court: The witness doesn't understand it, but I think you can put it this way. If an underwriter is inquisitive he can only find out the facts that the operator wants to give him, isn't that correct?

The Witness: Yes.

Mr. Meshel: I don't believe that is the testimony.

The Court: And if the operator was concealing something then this duty of inquisitiveness couldn't have revealed it anyway, that's what he is talking about.

Mr. Barish: If I may, your Honor—

(307) The Court: I want to get the answer of the witness.

Mr. Barish: I would like to object to the question.

The Court: You may object to it. Go ahead.

The Witness: Well, that's correct, except, of course, that's the obligation of the man presenting the risk—that is, the broker—to reveal what he knows about the risk. If he doesn't know, as I understand it, and I think I am right, even though a situation has existed for years and the owner knows it, there is an obligation not to come up with what is called a concealment of a material fact. You can ask so many questions but it's not possible to ask a whole gamut of questions, unless you ask a man are you telling the truth. We assume the business of marine insurance is based on that, it's a foundation.

The Court: You say the contracts are placed through the brokers, by and large, is that correct?

The Witness: Yes, your Honor.

The Court: And in this duty of inquisitiveness, I think you call it, do you feel that the underwriter should go beyond the broker and go and see his principal?

The Witness: No, sir.

The Court: You don't?

(308) The Witness: No, sir.

The Court: So the duty of inquisitiveness is limited to what the broker might know.

The Witness: Or could find out.

The Court: Or could readily find out. But he couldn't find it out unless the inquisitor suggested what he wanted to know.

The Witness: That is true, your Honor, except that through the years the brokers are experts and they know what a good underwriter wants to know.

The Court: Let me ask you this: Is a broker apt to know if, not saying this is the fact in this case, but let's assume that this fleet of vessels was overloaded on a regular basis. Is that something the broker is apt to know?

The Witness: No, I would rather, if it's done on a regular basis I would rather charge the underwriter that he should have knowledge of that fact, if it's a part of the trade he is charged with the responsibility of knowing the practices of the trade. He doesn't—

The Court: Is overloading a practice of the trade?

The Witness: It was in this particular instance, I assume.

(309) The Court: Maybe you and I have different views on practice. What do you mean by practice?

The Witness: Well, I would assume that if, just for the purpose of illustration, if 20 vessels sail from Freeport, 18 of which were overloaded, I would assume it was a practice of the trade.

The Court: What trade?

The Witness: This particular grain trade.

By Mr. Kalaidjian:

Q. You mean the owner's practice in that trade? A. The owners, plural.

Q. I am talking about the owners insurers' practice.

Mr. Barish: I think he answered that already.

A. Yes.

The Court: I take it that is something that you would feel that an underwriter would be looking out for, would he?

The Witness: Yes, he should. He should. He should. You see, it's an awfully difficult thing to reduce to a concrete term.

The Court: Let me go forward. Suppose you were an underwriter and there was a fleet of ships that asked you for Hull insurance, and you in your intelligence, found out that all these ships went to Freeport and that they (310) took on fuel and water in Freeport and it was reported to you they always sailed from Freeport

below their marks. What would you do? Would you say, "I want to find out about this," or what would you do?

The Witness: I think I would want that confirmed. If it were a fact I would very likely decline the risk.

Mr. Kalaidjian: That's all, your Honor.

The Court: Any other questions?

Mr. Barish: Thank you very much.

Mr. Meshel: Thank you, Mr. Dwelly.

(Witness excused.)

Mr. Meshel: Your Honor, you don't mind if we switch questioners?

The Court: As long as Mr. Kalaidjian doesn't mind, I don't.

Mr. Barish: Mr. Scarpello.

CHARLES SCARPELLO, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Barish:

Q. Mr. Scarpello, what's your occupation? A. I have a master's license in the Merchant Marine, but I have sailed in all deck capacities.

(311) Q. Your master's license qualifies you to sail seven seas? A. It does.

Q. Prior to August of 1964, Captain, could you tell us whether you were involved in any way in the carriage of grain to India? A. Yes. Well, not necessarily. It was bulk cargoes. Some of it was grain and some of it was fertilizer.

Q. Could you tell us, Captain, prior to 1964, what vessels you sailed on this particular run? A. One was the Columbia and the other was the Missouri.

Q. What was the name of the companies for which you sailed? A. They were all the same company, Oriental Exporters.

Q. Were these considered tramp vessels in the trade? A. Yes.

Q. Could you tell us, Captain, where these vessels departed the U. S., from which port or ports? A. I will give them to you to the best of my ability to remember from discharges and what information I have here.

(312) Q. Let me ask you this: Were they from Gulf ports? A. Gulf ports, yes.

Q. And could you tell us, Captain, at the time that you left from the Gulf port what the condition of the cargo was? By that I mean how much cargo were you carrying, not in tons necessarily but in relation to your mark? A. Well, we sailed from the Gulf ports always fully loaded, fully down, right to the mark for that time of the year.

Q. Can you tell us when you left the Gulf ports how much fuel you had aboard? By that I mean not in gallons or barrels, but enough to get you where? A. Well, if my memory serves me correctly, one time it was clear to the Suez Canal, and the next time it was to Ceuta, which is across the Atlantic.

Q. Could you tell me, Captain, did you, when you left the Gulf ports go to Freeport on these vessels? A. Yes, we did, to the best of my knowledge, if I remember right.

Q. When you left Houston and before you got to Freeport, how much fuel did you have aboard? A. We had enough fuel to take us to Freeport. I am quoting back in memory now, there is almost ten years. Enough fuel to get to Freeport, plus the required amount over (313) that you need.

Q. Which is what? A. About 20 percent.

The Court: Safety allowance?

The Witness: Yes, your Honor.

Q. What was that, one day's fuel? A. It depends. It's usually around somewhere in the neighborhood of 20, 25 percent.

Q. And when you got to Freeport, what did you do at Freeport, Captain? A. Well, we took on bunkers and/or water.

Q. And when you left Freeport, could you tell us where your vessel—what the condition of your vessel was insofar as the mark was concerned? A. Well, it's obvious that it was overloaded. If you subtract, say,—say it takes two days to get to—say you leave from New Orleans and it takes a couple of days to get to Freeport and you have got only half a day's fuel over, or even another day's, then it's going to take another ten days to get across, it's obvious that you are overloaded.

Q. And was this your experience on the vessels you were on that carried grain that made this run? A. Yes, as I stated.

(314) Q. Can you tell us whether or not this was a practice in the tramp industry at the time you were—

The Court: I am not going to let him answer that question. I don't know that he is competent to answer a question as to what was the practice of the tramp industry. This was the practice that your company followed, is that correct?

The Witness: Well, I wouldn't say they followed it on every ship because I was only on three ships of that company, but I do know from speaking to others—

The Court: You were on the Columbia and the Missouri?

The Witness: Yes, and later on another ship but not out of the Gulf.

The Court: The Columbia and Missouri, what kind of vessels are they?

A. Bulk carriers.

The Court: Were they new?

The Witness: No, one was a C-4 converted into a bulk carrier, and the other was a T-2 converted into a bulk carrier.

The Court: How many voyages did you make on the Columbia and the Missouri during this period in 1964?

The Witness: I would have to go back.

(315) The Court: Just give me an estimate.

The Witness: I have it right here. It will take a minute.

(Pause.)

The Witness: Five voyages on the Missouri, and I've got eight discharges from the Columbia.

The Court: And your record indicates this was Gulf ports via Freeport to India?

The Witness: Not every trip. I remember going to Freeport twice.

The Court: Twice?

The Witness: You are asking me to go back ten years.

The Court: I know.

The Witness: It's pretty difficult. I don't have an itinerary here, all I have is just the name of the ship and the dates.

The Court: But as you think of it now you went in twice?

The Witness: Twice I remember. It could have been a third time.

The Court: You took on fuel and water in Freeport and your recollection is when you left Freeport you were below your marks?

(316) The Witness: We had to be, it's obvious.

The Court: You say you had to be. All right. You didn't look at them, they are hard to look at at Freeport.

The Witness: There is a heavy swell running there all the time.

The Court: Yes.

Q. Captain, you have listed several vessels. They were the only two vessels that made that particular run you have just described, isn't that so? A. That's right.

Q. Have you spoken to other masters involved in the same run? A. Oh, yes, I spoke to Captain Walsh, who is now dead, several times, about the ship he was on. As a matter of fact, I used to kid him—

Mr. Kalaidjian: Objection.

The Court: What was Captain Walsh's ship?

The Witness: I believe it was one of the Smith ships, but I don't remember the name of it. But he was on several of them, and I used to kid him, I asked him if he had the plimsoll mark up on the stack.

The Court: What did he say?

The Witness: He used to laugh, he says, "It (317) seems so," he said, the cargo they used to put on there.

Q. Captain, I am not asking you now for—well, from your knowledge of this particular trade, namely, the Gulf ports to Freeport to India, could you tell us what your mental picture is as to what went on in this particular industry?

Mr. Kalaidjian: Objection, your Honor.

The Court: That is an awfully complicated question, and I am going to confine the question. I was glad to have him tell us about Captain Walsh and about his two or three visits to Freeport, and I think he said in talking to other ships' Captains you found this happened to other people, too.

The Witness: It was comon knowledge to all of us. We all knew it.

The Court: All right, I will let you say that, that's all.

The Witness: As a matter of fact, you could see some of the ships in Freeport, I don't recall names because I never paid particular attention to the names of the ships, but you could see them, some of them, of course, were foreign ships, they were down below their marks.

The Court: Did you like going out of Freeport below your marks?

(318) The Witness: You never like to—I have been on some ships that were on their marks and I was even more scared than I was on the ones that were below their marks because they were nothing but rust buckets. At least these two ships were in pretty good condition. You see, when you put a ship below its marks that's less time that you have to get off of that ship if it starts to leak on you.

The Court: It fills up a little faster?

The Witness: That's right.

The Court: Thank you, Captain.

Mr. Barish: Thank you, Captain. I have no further questions.

Mr. Kalaidjian: No cross examination.

The Court: You are excused, Captain.

(Witness excused.)

The Court: We will take a short recess.

(Recess.)

Frank DiVenti, for Plaintiff, Direct

(In open court.)

FRANK DiVENTI, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

(319) *Direct Examination by Mr. Barish:*

Q. Captain, what license do you have? A. I have a master's license.

Q. Prior to August 1964, could you tell us whether you were aboard any vessels carrying grain to India? A. Yes.

Q. Could you tell us what companies and what vessels? A. I was with Hudson Waterway, Trans-India, and I was also with Cargo Tank, The Mount Rainier, and it so happens both of those vessels bunkered in Freeport.

The Court: Were you serving as master on those vessels?

The Witness: No, sir. In fact I want it known that actually I have a master's license, sailed in all categories but master.

The Court: What was your rating?

The Witness: Third officer.

The Court: Third officer on these vessels?

The Witness: Yes. This was some time ago.

The Court: All right.

Q. Approximately how many times would you say you have bunkered in Freeport, six? A. To my knowledge, I'd have to go back in the (320) records, I seem to recall four. It may have been three, but I seem to recall four.

Q. Was this each time that you were carrying grain to India or a similar port? A. It so happens the two ships mentioned they both carried grain.

Q. Did you depart from the Gulf port? A. Yes.

Q. At the time you departed can you tell us what the state of the cargo was in relation to the loadline? A. In

relation to the loadline, they loaded right down to her marks.

Q. Could you tell us the amount of fuel you had on in relation to the trip to Freeport? A. I'd say just sufficient to get to Freeport because I recall that was always their concern, and particularly on the one vessel, the Rainier, they were so concerned they pumped water over so they could make it there and not be over their marks. They were down to their marks leaving, though.

Q. And when you left Freeport,—well, prior to leaving Freeport did you take on bunkers there, if you recall? A. Yes, that's where we bunkered. Also water.

(321) Q. What was the effect on the loadline integrity of the vessel upon the loadline of having taken bunkers and water from Freeport? A. It's obvious she was over her marks.

Q. Are you aware of what was going on in the grain industry at the time you were sailing?

Mr. Kalaidjian: Objection. The question is vague.

The Court: I will sustain the objection to that, Captain, can you tell us, when you went to Freeport, do you know whether the other ships' officers were doing the same kind of thing at the same time?

The Witness: This was being done constantly to my knowledge. I have various associates of shipmates that acknowledge this an accepted fact, common knowledge.

Mr. Barish: I have no further questions.

Cross Examination by Mr. Kalaidjian:

Q. Mr. DiVenti, did you ever hear of the Loadline Act? A. Yes, I have read about it but I wouldn't say I am quite familiar with it.

Q. When you sat for your license as a master, were you expected to be familiar with the Loadline Act? (322) A. Yes.

Q. Are you aware under the Loadline Act of the consequences of loading a vessel over her marks? A. Yes, I am aware to an extent, yes.

Q. What are some of the consequences to a licensed master for overloading his vessel? A. There can be various penalties for overloading.

Q. They are imposed by the U. S. Coast Guard? A. Yes, sir.

Q. Did you ever see any of the Earl Smith vessels at Freeport? A. No, but I have seen them at sea and I wondered how they managed to stay afloat.

Q. Where did you see them at sea? A. I passed them at sea. I passed them many a time.

Q. What's a time that you can recall? A. Well, I'd say anytime between—

Q. No, no, a specific occasion. A. I can't be specific. I passed thousands of ships, and you expect me to be specific? Thousands.

Q. No, I only expect you to be truthful, that's all. A. I can assure you I am being truthful. I seem (323) to recall, if I may add, the gentleman that Mr. Scarpello was referring to who is now deceased, and the time he was on one of the Smith ships—

The Court: That is Captain Walsh?

The Witness: Captain Walsh, yes, sir. Captain Walsh. I happened to mention, I said, "Boy, look at that baby, she is really down," and one of the mates aboard says, "You know, Captain Walsh has got that ship, because Sparky was talking to her last night." That's how I happen to recall passing her.

Q. Was this at sea? A. At sea, yes.

Q. How close did you pass? A. How close?

Q. Yes. A. I didn't engage it. I'd say—

Q. Half a mile? A. I'd say normally a mile or so.

Q. A mile distance? A. Or so. It might have been a bit more or less.

Q. Were you able to see the markings, the plimsoll markings? A. No, I didn't see that. I took a look at her through the glass. I could see her clearly, though, I can (324) assure you.

Q. You looked at her through the glass? A. Yes.

Q. I supose you were on watch at that time? A. On watch, yes, sir.

Mr. Kalaidjian: That's all.

The Court: Any other questions, gentlemen?

Witness excused, thank you. You are excused.

(Witness excused.)

Mr. Barish: Your Honor, I have a problem which I would like to relate to the Court. There is a Coast Guard Captain by the name of Garth Reid who was charged with marine inspections who was to be here today. He was recently operated upon for a hernia and yesterday called me and told me that he was running a fever and that today went into the hospital because of some infection. I don't know how long he will be in, or whether he is going to be in, and I won't know until this afternoon.

We also have several other captains if the Court thinks it's necessary, though it will be merely cumulative. Mr. Reid would testify this was a known practice to the Coast Guard, but they couldn't do anything about it because they had no jurisdiction in Freeport.

If you think that his testimony would be (325) enlightening or relevant, I would like the Court's permission either to call him at a later date or to take his deposition and submit it to your Honor.

The Court: Let's find out what the situation is when you talk to him this afternoon. Have you any other witnesses?

Colloquy

Mr. Barish: That's all I have, your Honor. Everything else would be cumulative.

The Court: Mr. Meshel.

Mr. Meshel: I made the application to your Honor that I thought I might be in a better position as a judgment creditor rather than merely taking subject to whatever rights Mr. Smith and the Quinn Corporation has. I have a gentleman, it's a very simple situation, we were paid by a check and I have the check and documents here and I would like permission to put my witness on, it shouldn't take more than ten minutes.

The Court: Go ahead.

Mr. Kalaidjian: I claim surprise in respect of this request.

The Court: I will listen to the witness, and if I think it's a surprise I will take it up with you.

Mr. Kalaidjian: As I understand it he intends to prove the claim of the Government of India in the limitation (326) of liability action, and it was agreed at one of the earlier pre-trial conferences in this case that the damages of the claimants would be held in abeyance until the Court had ruled, and I have had no discover—

The Court: I agree, but there was some reference, Mr. Meshel said this gentleman wanted to go to India or something like that.

Mr. Meshel: No, I don't want to make that representation. He is from Washington.

The Court: Put him on. He is the gentleman sitting here all this time.

Mr. Meshel: Yes, he has been very patient.

The Court: Put him on. Maybe he will have to come back.

Udho Ram, for Plaintiff, Direct

UDHO RAM, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Meshel:

Q. Mr. Ram, by whom are you employed? A. I am employed by the Government of India and the Indian Supply Mission of Washington.

Q. Is the India Purchasing Mission an arm of the government of India? (327) A. Yes.

Q. Did I ask you to bring with you books and records of the India Supply Mission kept in the regular course of business with regard to when it loaded aboard the Smith Voyager? A. Yes.

Q. Who was the supplier of the wheat? A. Producers Export Corp.

Q. How were they paid?

Mr. Kalaidjian: The competency of the witness to answer the question is not established.

The Court: He is testifying from the records of the supply mission.

Q. I show you a set of documents, Mr. Ram, and ask you whether these documents were taken from your files with regard to the purchase of the wheat? A. Yes, sir.

Mr. Meshel: I would offer these various documents as India Exhibit 7, collectively, for identification.

(Plaintiff India Exhibit 7 marked for identification.)

Q. Mr. Ram, was submission of certain shipping documents? (328) A. Yes.

Q. Were they paid on the basis of a letter of credit with the Bank of America? A. Yes, sir.

Mr. Maass: Objected to as leading.

Mr. Meshel: It's leading.

The Court: I think the papers speak for themselves. That is all reflected in those papers?

Mr. Meshel: Yes.

Q. How much did the Government of India pay for the entire quantity of wheat loaded aboard the Smith Voyager? A. This is exactly $700,237.

Mr. Meshel: That's all the questions I have.

Mr. Kalaidjian: This is the first opportunity I have had, I have not seen the documents and I would like the opportunity to reserve my cross examination of this witness at a later date, if it should become material.

The Court: If you think it's important I will give you that chance.

Mr. Kalaidjian: I am speaking now in the context of limitation action. On that basis I can defer any cross examination.

The Court: Let's not worry about it. I want you to have a chance to look at those documents. I take it (329) these are just documents obtained in the India Supply Mission, and in relation to the Smith Voyager, and that's all they are, and you can look at them and if there is any reason you want to bring this gentleman back I will give you a chance to bring him back. I don't think he can answer any questions because he just brought them from the files.

Mr. Meshel: That's correct.

The Court: If you want anybody else from the India Supply Mission we can probably arrange for that.

Cross Examination by Mr. Kalaidjian:

Q. Mr. Ram, were you with the Washington office of the India Supply Mission in 1964? A. No, sir. I was in New Delhi at that time.

Udho Ram, for Plaintiff, Cross

Q. Is there an agreement between the U. S. Government and the Government of India which covers the shipment that was on the Smith Voyager? A. You see, these were made under Public Law 480.

Q. Is there an agreement in writing between the U. S. Government and India with respect to the financing of the Smith Voyager cargo under Public Law 480?

Mr. Meshel: May I interrupt at this point? I think that the P. L. 480 funding program is a matter of record and part of our statutory law and any questions on (330) that the Court can take judicial notice.

The Court: Mr. Ram can answer if he knows that. Does he know?

A. Yes, sir. We had an agreement in 1964, a long-term agreement, under which funds were provided by the U. S. Government and we were making imports under those arrangements.

Q. Have you brought that agreement with you? A. No.

Mr. Kalaidjian: I call for the production of that agreement for use in connection with some future opportunity to cross examine this witness.

Mr. Meshel: There is no question but whatever repayment techniques the Government of India has with the U. S. Government is irrelevant.

The Court: Gentlemen, all this witness came was to identify these documents as having come from the files.

Mr. Kalaidjian: As long as Mr. Meshel will say he accepts that and he doesn't intend to cite these documents as the basis for a judgment I will go along with that and just simply reserve the opportunity at a later date for cross examination.

The Court: When we get to damages I will give (331) you a chance to, but I don't think this will be

the gentleman to cross examine, anyway. There must be a better witness from the point of view of somebody there at the time.

Is there anybody in Washington now who was in the supply mission in 1964?

The Witness: No, sir.
The Court: They have all gone back to New Delhi?
The Witness: Yes, sir.

The Court: I take it there are no other questions, gentlemen?

Mr. Kalaidjian: That is all I can ask at this time, your Honor.

The Court: All right. Thank you, Mr. Ram. You are excused.

(Witness excused.)

Mr. Meshel: Your Honor, there is one other order of business, Mr. Huttenbrauck has sent the Court a letter with regard to the payments under the primary policy, and as I understand it, Mr. Kalaidjian and the Court and everybody received copies of it, and the letter is nothing more than a reiteration of a consent order your Honor signed settling these claims and the monies were paid.

I understand also, that there is a small amount (332) that was kept in escrow, something like $10,000 or $11,000, and Mr. Huttenbrauck would agree to come here to testify if it became necessary this money is available and that that $10,000 shouldn't prevent the Court from arriving at the conclusion that the primary insurance is exhausted.

If that is a contention, I guess we will have to bring Mr. Huttenbrauck here.

The Court: I have a letter from Mr. Huttenbrauck dated June 14, 1973 which breaks down the payments made I guess by the British P & I Club, which is the primary insurers.

Mr. Meshel: That's correct.

The Court: It comes out to a total expenditure of $1,987,501.58. It states it leaves a balance of $12,498.42, which his client is retaining pending the final determination of the matter.

Mr. Meshel: That's correct. That is what I was referring to.

The Court: You want to put this letter in?

Mr. Meshel: Please.

Mr. Kalaidjian: I object to the letter, in its entirety. I stipulate the amounts shown on page 1 of the letter which Mr. Huttenbrauck says were disbursed were in fact disbursed. What I object to is the second page in (333) which Mr. Huttenbrauck makes the self-serving statement there is only $12,498.42 of coverage left.

I will tell you what my problem is. I have not seen the underlying policy, which I should have expected it would be part of the proof of the claimants, and, therefore, I don't know whether that policy, like many others, provides to the assured in addition to the policy limits for liability an obligation to defend.

Now, your Honor will notice that on the first page there are approximately $117,000 that was paid to attorneys, and in the absence of the underlying policy or a certificate of entry which indicates the extent of the coverage afforded I simply can't stipulate that.

The Court: I am not asking you to stipulate anything. I am just asking if you object, and I will receive the letter, and you can reserve on that. The letter is subject to any comments you wish to make.

Mr. Kalaidjian: The second page contains a statement which is simply hearsay, and it does not derive from any policy. It's a self-serving statement by the primary.

The Court: It doesn't self-serve me at all. It doesn't make any difference to me.

Mr. Barish: If it does create some sort of (334) problem I have received from Mr. Davis a copy of the underlying policy. I will ask for it being identified and move its submission, and I might point out I believe the key paragraph has already been introduced because it was introduced by Mr. Kalaidjian in a letter from Frank B. Hall to your company setting forth the concept of legal fees.

(India Exhibit 8 received in evidence.)

(India Exhibit 9 marked for identification.)

Mr. Kalaidjian: What is offered as the underlying policy is simply the rules. I don't know for what period these rules were in effect, nor do I see any document which says that the Smith Voyager was insured according to the terms of these rules. If there is such a document I will go along with it, but I must object to the simple tender to the Court of the rules of a club.

The Court: Why isn't the policy produced?

Mr. Barish: As I understand it, and I believe it was explained in a deposition Mr. Kalaidjian introduced in evidence, there is no policy as such, there is a—it's sort of a booklet, and this sets forth the terms of the obligations and what have you, and that's the reason there is no policy introduced. I think Mr. Lucey mentioned something like that in reply to a question.

Mr. Kalaidjian: There is a certificate of entry, (335) and the broker who handled it is right here in New York.

The Court: Whatever document it was that represents the British P & I Club primary insurance on the S.S. Smith Voyager covering any loss up to a certain amount, that's what I want. Is there such a document?

Mr. Barish: Your Honor, perhaps we could call Mr. Huttenbrauck and maybe cut out a lot of time here.

The Court: I would think so. I think Mr. Kalaidjian is entitled to that.

Mr. Barish: Yes, sir.

The Court: All right. What else is there, gentlemen?

Mr. Barish: Other than the Coast Guard officer, nothing from my client, your Honor.

The Court: What Coast Guard?

Mr. Barish: The gentleman who is in the hospital that I mentioned earlier.

The Court: How about anybody else?

Mr. Meshel: Nothing, your Honor.

The Court: Mr. Davis?

Mr. Davis: Your Honor, I have some exhibits to introduce, exhibits that have previously come from the files of the defendant, American Manufacturers Mutual, but before I introduce them I wanted to show them to co-counsel (336) for the plaintiffs.

The Court: I think we will recess until 1:45 and see what there is then. Maybe you can find out the status of your witness by then.

Mr. Barish: Yes, sir.

(Adjourned to 1:45 P. M.)

Daniel Huttenbrauck, for Plaintiff, Direct

Afternoon Session

1:45 P. M.

(In open court.)

The Court: Mr. Davis, did you have some exhibits?

Mr. Davis: I prefer to let Mr. Huttenbrauck take the stand first.

DANIEL HUTTENBRAUCK, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Meshel:

Q. Are you an attorney duly licensed to practice in this Court? A. Yes.

Q. Are you associated with a firm or partner in a firm? (337) A. Mendes & Mount, 27 William Street.

Q. Does that firm represent or did they represent a London Insurance Group in connection with the claim on the Smith Voyager? A. We did.

Q. Whom did your firm represent? A. We represented the London Steamship Mutual Insurance Association Ltd.

Q. Were you the partner in charge of this particular case with regard to the primary insurance? A. I have, and from September 22, 1969, to date.

Q. Can you tell us whether or not there was any form of policy that was issued as such in connection with the Smith Voyager? A. Not in the sense of the terms that we ordinarily think of a policy. The vessel was entered into the association and it's included in the names of vessels here in a book called the Rules, 1964-1965, and alphabetically tabulated I see the name of the Smith Voyager.

Mr. Meshel: I would offer for identification this manual called the London Steamship Owners Mu-

tual Assurance Association Rules, 1964-1965 as India Exhibit #10.

(Plaintiff India Exhibit 10 marked for identification.)

(338) Q. Is Smith Voyager and the companies that owned and chartered and managed that vessel, are they contained in Exhibit 10? A. Yes.

Q. At what page, Mr. Huttenbrauck? A. On page 84, Smith Voyager, entered by the Anne Quinn Corporation, and it has the gross tonnage.

Mr. Meshel: I would offer that pamphlet into evidence as India Exhibit 10.

Mr. Kalaidjian: No objection, your Honor.

(India Exhibit 10 received in evidence.)

Q. Mr. Huttenbrauck, are the rules of the club contained in Exhibit 10? A. Yes.

Q. Is it your understanding that attorneys' fees incident to the defense in the limitation action were properly the types of disbursements to be paid out under the primary policy? A. Yes.

Mr. Kalaidjian: Objection. The policy will speak for itself on that point.

The Court: I will let him answer it.

Q. Mr. Huttenbrauck, did you receive from the club any funds which you disbursed later on to personal injury, cargo and other claimants? (339) A. Approximately $1,800,000.

Q. And that is all set forth in your letter to Judge Bonsal of June 14, 1973? A. Yes, except that of course I didn't have anything to do with the repatriation, maintenance and cure expenses of 33,000-odd, but I of course paid out all the money in connection with the personal injury, debt and cargo claims of $1,821,000.

Q. Did your client pay out these repatriation expenses of $33,000-odd, to your knowledge? A. Yes, they did.

Daniel Huttenbrauck, for Plaintiff, Cross

Q. Do you have the authority to act on behalf of the club in the U. S. with regard to payment of monies? A. Yes.

Q. Would your club pay out the balance of the $2 million policy at the direction of the Court? A. At the direction of the Court, we would be reluctant to pay it out at the moment because there are a number of claims, people making claims against the fund, and we have been just holding that money until the claims have been determined.

The Court: What claims?

The Witness: There are a couple of counsel fee claims.

(340) Q. Is the club making any claim for withholding any part of the $2 million primary policy? A. Oh, no, no, none.

Mr. Meshel: That's all the questions I have, your Honor.

Mr. Kalaidjian: No questions.

Examination by Mr. Reid:

Q. Mr. Huttenbrauck, you say that you paid out on the debt and personal injury claims. There was one claim of Alfred Ita, you did not pay out on that, did you? A. That was a—I don't think I paid out on that personally, that was paid out before I got into the case but that is included within the $1,821,000.

Q. I see. And was that included because of the fact that they had not paid the premium on the policy? A. I don't understand your question.

Q. Well, the owners advanced the money to pay Mr. Ita's claim, and how did that get into the P & I list of claims as a credit? A. It must be because there was unpaid premiums.

Q. But they didn't actually pay any money out to Mr. Ita through the owners? A. I think not. I think that's right.

Q. And there was a claim of Mr. Gilmore for loss of (341) effects and wages. You didn't pay that out, either, did you sir? A. No, I don't think we did.

Q. Mr. Huttenbrauck, do you remember that my firm had submitted a bill for approval services and disbursements on appeal, and could you tell us whether or not the primary ever paid our bill? A. Well, they paid some of your—

Q. Talking about for the appeal. A. I think not. I think we did not pay it because—well, we didn't pay it.

Mr. Reid: Thank you.

The Court: Mr. Huttenbrauck, you say there is an item of 33,000 for repatriation, etc.?

The Witness: Yes, sir.

The Court: Who paid that?

The Witness: The owners paid it I assume and the association reimbursed.

The Court: All right.

The Witness: The other items in my letter all are the same way, money that the association paid probably to various law firms such as expert fees and witness' expenses.

(342) Mr. Reid: And that was on the trial before Judge Bonsal, was it not?

The Witness: Yes, sir.

The Court: Okay. Thank you, Mr. Huttenbrauck, witness excused.

Mr. Davis: Off the record.

(Discussion off the record.)

Mr. Davis: I had wished to offer some exhibits, unfortunately, I didn't have time to have them previously marked. These are all exhibits from the files of the defendant, and after I will show them to the defendant, they can make sure as to what's what.

Colloquy

Mr. Barish: Mr. Huttenbrauck has requested that book be returned to him. Would it be possible at the termination of the Court session today to give us leave to make Xerox copies, as many as necessary, and return the original to him?

The Court: You certainly have leave. I will see you get that back, Mr. Huttenbrauck. Do you need it back today?

Mr. Huttenbrauck: No, your Honor. It's not my copy. That's the thing I am worried about.

The Court: I will see it gets back to you, even if I have to hold on to it myself.

(343) Mr. Huttenbrauck: Thank you very much.

Mr. Davis: I should like to offer in evidence as Plaintiff Veenstra Exhibit 2 a letter of Admiral Hepburn to the Commands of the Coast Guard dated December 17, 1966. I offer it in evidence, your Honor.

(Plaintiff Veenstra Exhibit 2 received in evidence.)

Mr. Davis: I offer in evidence as Veenstra Exhibit 3 a letter dated December 27, 1966, from the Coast Guard to Admiral Hepburn.

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 3 received in evidence.)

Mr. Davis: I will offer in evidence an undated paper addressed, "To American Underwriters," and signed in behalf of S. A. Long, Anne Quinn Corporation, and Earl J. Smith and Co., demanding payment of the hull loss.

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 4 received in evidence.)

Mr. Davis: I offer in evidence letter dated January 14, 1965, being a letter from the Adjusting Department of Frank B. Hall to various companies, one of which is American Manufacturers Mutual, with an attachment, (344) undated, headed, "Statement of Frederick W. Mohle, Master."

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 5 received in evidence.)

Colloquy

Mr. Davis: I offer an excerpt from the files of the defendant consisting of a reprint from the New York Times, Page 66 of March 5, 1954.

Mr. Kalaidjian: It's just a newspaper article referring to the fact that a charge has been presented against Captain Mohle. To the extent it was in my client's file I have no objection.

(Plaintiff Veenstra Exhibit 6 received in evidence.)

Mr. Davis: I offer a letter from the defendant to one Lane Bates of Guy Carpenter and Company as Veenstra Exhibit 7.

The Court: What's the date of that?

Mr. Davis: March 25, 1965.

Mr. Kalaidjian: No objection.

(Veenstra Exhibit 7 received in evidence.)

Mr. Davis: I offer paper from the defendant's files headed, "Kempergram" dated March 29, 1965, as Veenstra Exhibit 8.

Mr. Kalaidjian: No objection.

(345) (Plaintiff Veenstra Exhibit 8 received in evidence.)

Mr. Davis: I offer copy of a letter from Admiral Hepburn to Mr. Reid, Edwin K. Reid, dated January 13, 1967, which came from the files of the defendant. I offer it as Exhibit 9.

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 9 received in evidence.)

Mr. Davis: I offer copy of a letter dated February 20, 1967, from Admiral Hepburn to Edwin K. Reid, consisting of three pages, with the attachment of an undated, unnumbered page, this attachment being headed, "Extracts from Testimony of Mr. John F. Fitzsimmons, Vice-President, Operations, Earl J. Smith and Co."

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 10 received in evidence.)

Mr. Davis: I offer in evidence as Veenstra Exhibit 11 letter from U. S. Bulk Carriers, Inc. Parenthetically,

your Honor, that's the company that succeeded to the interests of Earl J. Smith and Co. Which letter was addressed by U. S. Bulk Carriers to the defendant. I offer the entire letter as Exhibit Veenstra 11.

(346) The Court: What's the date of that?

Mr. Davis: July 28, 1967.

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 11 received in evidence.)

Mr. Davis: Last, I offer letter dated August 24, 1967, written by U. S. Bulk Carriers to Lloyd Anderson, Manager of the defendant, of a department of the defendant. I offer it as Exhibit 12.

Mr. Kalaidjian: No objection.

(Plaintiff Veenstra Exhibit 12 received in evidence.)

Mr. Davis: Thank you, your Honor. I have nothing further.

The Court: All the plaintiffs rest now?

Mr. Barish: I just wanted to make this statement, your Honor. There are three ships' Captains who would be in, but I have indicated their testimony would merely be cumulative and there is no need for that.

I contacted, I attempted to contact the Coast Guard officer, but there was no answer at his home, and I assume that he is still at the Bethesda Hospital. I don't want to keep the Court sitting waiting for this, and perhaps if the Court would give me leave within a limited period of (347) time to take his deposition, if that is possible, and supply that into the record I would appreciate that.

The Court: Who is this gentleman?

Mr. Barish: Garth Reid, your Honor. He was to be here today to testify but called me yesterday to advise he was going to the hospital today because he had a fever following an operation from which he was discharged from the hospital last week, and because of that he is not available today and rather than just tie the courtroom up waiting for him—

Colloquy

The Court: What would be the gist of his testimony?

Mr. Barish: The offer of proof on Captain Reid's testimony would be that it's known to the Coast Guard that this practice of overloading at Freeport was being carried on, that it was a matter which was common knowledge but that Freeport was outside their jurisdiction and that they had very little opportunity to do anything about it. He indicated that there were some prior citations of the Smith Company and of several other companies, including several American companies and several foreign companies—

The Court: Where was Captain Reid stationed?

Mr. Barish: He was the officer in charge of marine inspection in the port of New York, I believe, in (348) 1964 and 1965, but he was in one of the ports during this entire time, and is aware of—basically, he would testify to the practice that has already been testified to, and has been confirmed by Mr. Dwelly in his book, and also that the Coast Guard was in a very difficult position and couldn't do anything about it because Freeport was not within their jurisdiction. That's the scope of his testimony. To some degree it's cumulative, but he is a member of the Coast Guard and I thought that maybe it might be of some help.

The Court: Would you gentlemen stipulate if he were to appear he would testify that he knew people were overloading ships at Freeport and couldn't do anything about it in '64 and '65, or the Coast Guard couldn't. Is there any objection to stipulating that?

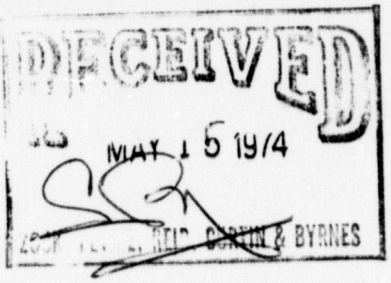
Mr. Kalaidjian: I have some problems with it, your Honor, because on cross examination we might be able to bring out that he could have done something about it in that at that time the Bahamas were a British colony and Great Britian was a signatory of the International Convention on Overloading, so I would feel more comfortabl-

Colloquy

The Court: Probably. I will leave that part out of the stipulation. I think all that is important is that he would testify they were aware of the overloading, and Freeport at that time was not in the Coast Guard's (349) jurisdiction. I guess I could accept that You will go along with that?

Mr Kalaidjian: Yes.

* * *



Copy Rec'd. 5-15-74.
Davis & Davis, B.C.

Service of a copy of the
within matter is hereby admitted
Date: 5-15-74 Time: 3:40
ABRAHAM E. FREEDMAN
L. Lugo

COPY RECEIVED

MAY 15 1974

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